EDITOR'S NOTE

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No: 85-6725-CFY
Status: GRANTED

Title: William John Bourjaily, Petitioner
v.
United States

Docketed:
April 15, 1986

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Willis, James R., Saltzburg, Stephen Allan

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Mar 7 1986		Application for extension of time to file petition and order granting same until April 15, 1986 (O'Connor, March 10, 1986).
2	Apr 15 1986	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Apr 28 1986		Waiver of right to respond filed.
5	May 1 1986		DISTRIBUTED. May 15, 1986
6	May 13 1986	P	Response requested. (Due June 12, 1986 - NONE RECEIVED)
8	Jun 12 1986		Order extending time to file response to petition until July 12, 1986.
9	Jun 27 1986		Brief of respondent United States in opposition filed.
10	Jul 2 1986		REDISTRIBUTED. September 29, 1986
11	Jul 10 1986	X	Reply brief of petitioner William J. Bourjaily filed.
13	Oct 3 1986		REDISTRIBUTED. October 10, 1986
15	Oct 14 1986		Petition GRANTED. limited to the following questions: 1. Whether, in order to admit an alleged co-conspirator's declarations against a defendant under Federal Rule of Evidence 801(d)(2)(E), the court must determine by independent evidence a) that a conspiracy existed, and b) that the declarant and the defendant were members of this conspiracy. 2. Assuming that the court must make these determinations, upon what quantum of independent proof must they be based? 3. Whether, as a requirement for the admission of a co-conspirator's statement against a defendant, the court must assess the circumstances of the case to determine whether the statement carries with it sufficient indicia of reliability.
			**********
17	Nov 4 1986		Order extending time to file brief of petitioner on the merits until December 29, 1986.
18	Nov 22 1986		Record filed.
19	Dec 15 1986		Joint appendix filed.
20	Dec 29 1986		Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers filed.
21	Dec 29 1986		Brief of petitioner William J. Bourjaily filed.
23	Jan 29 1987		Order extending time to file brief of respondent on the merits until February 5, 1987.
24	Feb 5 1987		Brief of respondent United States filed.
25	Mar 11 1987		Reply brief of petitioner William J. Bourjaily filed.
26	Mar 13 1987		CIRCULATED.

. 85-6725-CFY

try	Date	Note	Proceedings and Orders
7	Mar 27 1987		SET FOR ARGUMENT. Wednesday, April 1, 1987. (4th case).

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NO. 85-6725

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM J. BOURJAILY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Sixth Circuit Court of Appeals

JAMES R. WILLIS, ESQ.
Attorney for Petitioner
Suite 610, Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
(216) 523-1100

KENNETH S. McHARGH
Assistant U.S. Attorney
U.S. Department of Justice
Northern District of Ohio
1404 East Ninth Street, Suite 600
Cleveland, Ohio 44114-1748

QUESTIONS PRESENTED

I. Whether there was sufficient evidence for the Court to conclude that the petitioner and his co-defendant were co-conspirators and that, as such, certain statements made by and to this co-defendant were properly admitted under Rule 801 (d) (2) (E).

II. Whether the admission of considerable evidence showing the content of various conversations had by a crucial prosecution witness with third parties (here, a non-testifying co-defendant and another unknown person) violated the petitioner's right of confrontation.

III. Whether a conspiracy to violate the narcotics laws can be properly inferred from facts which at best only show a single isolatable transaction between a purchaser and a seller, where the latter was acting for and on behalf of himself and a Government informant (who actually supplied the contraband involved).

IV. Whether a conspiracy to violate the narcotics laws and a related illegal possession charge are established by proof that does not furnish a constitutionally sufficient basis to support a finding of guilt beyond a reasonable doubt.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM J. BOURJAILY,

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vs.

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PETITION FOR WRIT OF CERTIORARI
To The Sixth Circuit Court Of Appeals

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, William J. Bourjaily, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause. The judgment referred to affirmed petitioner's conviction in the District Court for the Northern District of Ohio for the crimes of Conspiracy (21 U.S.C., §846) and Possession Of Cocaine With Intent To Distribute (21 U.S.C., §841 [a] [1]).

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 781 F.2d 539 (6th Cir. 1986), and is set forth in the Appendix, infra, p. A 1. No opinion was delivered in the District Court.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Opinion of the Court of Appeals affirming petitioner's conviction was filed on January 15, 1986. On March 10, 1986, Justice O'Connor extended the time for seasonably filing a Petition For Writ Of Certiorari to and including April 15, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved in this case are:

(1) Sixth Amendment, United States Constitution.

(2) 21 U.S.C. §841 [a] [1].

(3) 21 U.S.C. §846.

(4) Rule 29 (a), Federal Rules of Criminal Procedure.

(5) Rule 104 (b), Federal Rules Of Evidence.

(6) Rule 801 (d) (2) (E), Federal Rules of Evidence.

STATEMENT OF THE CASE

William Bourjaily, the petitioner herein, was tried and convicted for the crimes of conspiring to possess and distribute, 21 U.S.C. §846, and for the possession with intent to distribute 21 U.S.C. §841 (A) (1), the drug cocaine. By this petition various evidentiary rulings made by the trial court and validated by the Sixth Circuit are challenged as having authorized the jury to consider as proof of guilt considerable evidence, the admission of which violated petitioner's right of confrontation.

STATEMENT OF THE FACTS [1/]

The facts upon which the convictions of William Bourjaily rest show simply that the Government dealt him into a so-called conspiracy solely on the basis of certain direct evidence that only showed him in the parking lot of a Hilton Hotel where he was seen in one spot and then moved to another. There he engaged in a brief conversation with Angelo Lonardo, his co-defendant at the trial, who had by then emerged from the Hotel lobby. Following this conversation Angelo Lonardo retrieved from the car of Clarence Greathouse, the informant, a package containing the "kilogram" of cocaine (involved in this case). Lonardo either put it in Bourjaily's car behind the front seat (as testified to by the agent closest to the event) or handed it to Bourjaily (as testifed to by another agent more distant from the event). See Tr. 796, 804-808.

Bourjaily's arrest was immediately consummated following the above occurrences. And, when the officers seized and searched the car Bourjaily was driving, they found twenty thousand dollars ($20,000.00), more or less, and other property all of which was confiscated by the Government. Also, the agents confiscated a lesser sum of money from this petitioner's person. None of these funds have been returned or forfeited in accordance with due process, which raises the specter that the Government has simply confiscated these funds on their own authority.

On the other hand, the circumstantial evidence admittedly shows a considerable number of conversations between the Government agent provocateur (Greathouse) and Angelo Lonardo. Many of these were played for the jury over our vigorous and

1/ References to the transcript of proceedings will be designated by the prefix "Tr".

persistent objections (Tr. 22-24, 31, 41). These conversations distill into a showing of extensive past drug dealings between those two. And, they show the efforts undertaken by them was to sell a kilogram of cocaine to a number of buyers. The money required to swing the transaction ostensibly was to be pooled by Lonardo into a sufficient fund. Also, Lonardo was to collect the balance of the money due over the initial down payment and then there would be an ultimate accounting between Lonardo and Greathouse.

Proof this is so follows from the fact that in the midst of the various taped Lonardo-Greathouse phone conversations, Lonardo made numerous references to his getting "people" together who were interested in buying some cocaine from him. This obviously was to be in direct proportion to the amount of money they would invest.

Significant too is the fact that there was no proof of any sort that Bourjaily ever talked to Greathouse about anything or to Lonardo about any drugs. Even this is not all. There was no proof offered that any of the money involved in any aspect of the transaction was contributed by Bourjaily or that he was to be one of those to whom Lonardo would be selling portions of the cocaine.

Indeed, the only evidence the Government can even now argue connects Bourjaily to the sale or sales Lonardo intended to make for himself and Greathouse is the statement made by Lonardo that his friend would be in the parking lot. But this clearly ambiguous statement is hardly the type of stuff that makes one privy to any criminal conspiracy. Here reference is being made to the taped conversation replicated in Government's Exhibit No. 13 (A). As the transcript of the Exhibit, (which was played for the jury) shows, Lonardo told Greathouse that he would be in the

hotel lobby and that Greathouse should just come on in and give him (Lonardo) the keys to the car. Lonardo then added "my friend will be out in his car and I'll just go over and you know ...." (See Government's Exhibit 13 [A]).

The Record here shows that even as to this particular statement, it was the Government's view that it was admissible "as to how they were going to proceed with this present deal, and Lonardo's instructing as to how the proceeding is going to go forward so that it is in furtherance of the conspiracy charged in the indictment." (Tr. 23-24).

Our specific response, which further illustrates the chief issues in this case, was the following comment:

> MR. WILLIS: "I might add, your Honor, that the conspiracy that Mr. Greathouse is talking about supposedly with Mr. Lonardo is a conspiracy betwen those two parties, and insofar as Mr. Bourjaily is concerned this reference is to some past conspiracy.
>
> And even if it [were] otherwise admissible for the purpose suggested by counsel, I think under Rule 403, the probative value insofar as the charges against Mr. Bourjaily is surely outweighed by the prejudicial impact of that evidence." (Tr. 24).

The extent to which this petitioner was wronged by the admission of the evidence above is amplified by a specific objection that goes to the heart of this petition. What counsel had originally stated, in making his objection, was that aspects of Lonardo's previous dealings with Greathouse were inadmissible against this petitioner. What counsel stated was:

> MR. WILLIS: Yes. I don't see how it's even possible that these conversations could ever be a part of a conspiracy yet to be formed, assuming one was eventually formed, in which Mr. Bourjaily and Lonardo were members.
>
> And he's being grievously harmed by this type of testimony which shows, if it does, some relationships between Mr. Lonardo and Mr. Greathouse in which he is not privy to, should not be affected by in any way.

> So I feel, your Honor, that we ought to be severed out of this case at this point because it can only get worse given the fact that the indictment charges a conspiracy in which Mr. Bourjaily could have only possibly entered on the day that the alleged sale took place.

(Tr. 22-23.)

Further evidence that was presented significant to this petition emerges from the Government's direct examination of Greathouse. Here Greathouse testified that he "was to purchase the cocaine ... and ship it to Lonardo and his buyers" (Tr. 28). While the cost to him was between $21,000.00 and $25,000.00, he and Lonardo agreed they would charge $31,000.00. To this he repeated "Mr. Lonardo was to line up his buyers" (Tr. 29).

At another point Greathouse amplified his deal with Lonardo by emphatically stating that:

> Mr. Lonardo was supposed to go out and call his people ... his buyers of cocaine ... he was supposed to line them up for the cocaine that ... [was] on order to be received. (Tr. 33).

This testimony validates counsel's arguments that constantly bombarding the jury with tapes showing Lonardo's conversations with Greathouse was improper and indefensible. The same was true, in our judgment, of testimony by various agents as to the considerable evidence bearing on the relationship between Lonardo and Greathouse.

Typically the objections registered in the following quote are reflective of the position maintained throughout this case:

> MR. WILLIS: I am reemphasizing the objections that I made earlier in connection with the testimony of Mr. Greathouse concerning these prior conversations he supposedly had with Mr. Lonardo, whether taped or untaped, recorded or unrecorded ....
>
> I continue to maintain that no conspiracy has been shown. But even if we assume that a conspiracy existed between Lonardo and Bourjaily, the inception couldn't possibly be ... before when the phone call was made in

> which some stranger was on the phone, [May 25] that would be the inception of the conspiracy. (Tr. 598-599). (Emphasis supplied.)

The Court's response was to simply verify that we had a continuing objection (ibid). While there was testimony by other agents bearing on their surveillance of Lonardo and of Bourjaily in the motel lot, the basic fact pattern would not be altered by any specific reference to their evidence. For the issues here being raised are sufficiently backgrounded by those facts outlined above.

Thus it was that the trial court concluded a conspiracy existed in which Bourjaily was a member and for that reason all the evidence conditionally admitted could be properly considered as it was against the petitioner by the jury (Tr. 989).

II

The Court of Appeals, in addressing our confrontation arguments, thoroughly misread the facts in this case. If not that, then they simply chose to ignore the undeniable thrust of certain indisputable facts.

In documenting the above assailment, the Court should note that as the Court of Appeals saw it, the Record will show:

> (1) "Greathouse testified that he arranged to transfer one kilogram of cocaine to Angelo Lonardo to be sold by 'people' Lonardo was to select"

Bourjaily, p. 541, Appendix "A", p. 3.

> (2) "Lonardo indicated that he talked to 'the people' and they were interested. He then stated that the deal would be handled as had been done in the past. Later in the conversation, Lonardo said that he would 'try to set some people up.' He stated that his contacts did not know that Greathouse was his supplier and Lonardo wanted to keep it that way. Greathouse demanded one-half of the purchase price before delivery

and requested that each of Lonardo's buyers purchase at least one-fourth of a kilogram. Lonardo agreed."

Ibid, and id., at 3.

The Court of Appeals' assessment of these tactics to the contrary, notwithstanding, there is absolutely nothing in the Record, nor has there ever been even the slightest contention made by the Government, that Lonardo was attempting to do anything other than sell the cocaine in quanities of one quarter kilos at a price fixed by Greathouse for their benefit. Indeed there is nothing in this Record to support even a suggestion that the people Lonardo would be selling to would in turn be selling or distributing the drugs for Lonardo.

Indeed at one point the Court of Appeals gave off an indication that they understood the different people Lonardo had lined up were being regarded as buyers. Otherwise the Court's reference to them as "Lonardo's buyers" makes no sense at all.

Since Bourjaily, if he was shown to have been criminally involved in anything, could only have been one of these buyers, the Court's further statement that "Lonardo's conversations with Greathouse establish that Greathouse was to supply the cocaine and Lonardo was to line up buyer/distributers and obtain partial payment from them" (Bourjaily, at p. 542 and id., p. 4) is really meaningless. What makes even less sense is the Court's very next statement that these conversations proved the existence of "the conspiracy and Bourjaily's membership" therein.

At the risk of being labelled disrespectful to the Opinion writer, what has been overlooked, if not ignored, is that for the Court's analysis to be correct then, contrary to what had always been viewed as dogma, in the Sixth Circuit at least the existence of a conspiracy can be inferred from the conversations between an informant who solicits an unsuspecting individual to find some buyers to purchase on partial credit a fixed quantity of cocaine

-- here a quarter kilo. And, the Court seems equally oblivious to another reality. If the original conversations between Greathouse and Lonardo established the existence of a conspiracy at that point, which obviously was before Lonardo even had a chance to find any potential buyers, then the Court must be regarding Greathouse as a conspirator. This, of course, he could not possibly be -- for the very obvious reasons stated in United States v. Debright, 742 F.2d 1196, 1198-1199 (9th Cir. 1984) and United States v. Elledge, 723 F.2d 864, 866 (11th Cir. 1984).

Simply put, there is no logic available to support the required conclusion that Greathouse and Lonardo formed a conspiracy that was joined by William Bourjaily.

ARGUMENTS RELIED ON FOR THE ALLOWANCE OF WRIT

At the core of the arguments made in this Petition, which supply cogent reasons why this cause should be reviewed, is the indefensible notion expressed by the Sixth Circuit with reference to the very serious confrontation and sufficiency problems involved. Indeed, our analysis shows that although it is clear beyond dispute that the jury was allowed to consider a vast quantity of hearsay evidence, the admission of which also violated Petitioner's right of confrontation, the Sixth Circuit's opinion simply cannot be squared with views previously expressed by this Court.

Indeed, the Sixth Circuit's opinion misunderstands and distorts an essential requirement of independent proof of the existence of a conspiracy and an accused's membership therein. This it does by expressly and boldly sanctioning the bootstrapping of obvious and unmistakable hearsay evidence by allowing it to demonstrate the satisfaction of the precedent conditions required for its own admission. See United States v. Bourjaily, 781 F.2d, at 542; Appendix "A", at p. 4 .

The above points aside, still other gross fallacies appear in the Sixth Circuit's analysis of the issues in this case. Most of these will surely be repeated in the Government's response, but in a way that will leave totally unobscured the flawed reasoning patterns indulged in by the Courts below. Here reference is being made to, among other things, the Sixth Circuit's fluorescent failure to recognize (in the formation of what will surely become known as the rule in the Sixth Circuit) that even when judged by their bootstrapping rule the assailed evidence was improperly admitted.

This follows because, as was shown in the arguments below the statements attributed to the primary non-testifying declarant

in this case falls into, at least, two catagories. First, there are the conversations had by Lonardo with Greathouse, whereby they were discussing their own deal. This was said to entail Greathouse providing cocaine that would be sold through Lonardo to various individual buyers on terms fixed by Greathouse. There was no evidence to show the potential buyers had combined to make a joint purchase. Next, there are the conversations supposedly had between Greathouse and Lonardo in which Lonardo is credited with saying a "friend" would be in the parking lot where the transaction or exchange was to take place.

With these facts in place the issue quickens. What is it about their development which shows a conspiracy between Lonardo and Bourjaily? And, assuming a conspiracy can be said to exist despite their seller-buyer relationship (if indeed the evidence shows that) when was its birth and who were its members? If the proof does establish that Bourjaily was the "friend" who talked to Greathouse, and if he could not conspire with Lonardo, who could he have conspired with?

The Sixth Circuit has failed to answer these questions, the answers to which are critical to the determinative issues in this case. If nothing else, the Government will show and tell us under what evidentiary theory the original conversations Lonardo had with Greathouse became admissible against William Bourjaily. Certainly they cannot agree with the Sixth Circuit that William Bourjaily's actions in the parking lot proved the existence of a conspiracy, which made the conversations Lonardo had with Greathouse admissible against William Bourjaily.

Not even the Government would dare to make that argument to this Court.

ARGUMENT NO. I

There Was Insufficient Evidence For The Court To Conclude The Petitioner And His Co-Defendant (One, Angelo Lonardo) Were Co-Conspirators And That, As Such, Certain Statements Made By Lonardo And To Lonardo Were Properly Admitted Against The Petitioner Under The "Co-Conspirator's Exception To The Hearsay Rule" Or Its Counterpart, Rule 801 (d) (2) (E), Federal Rules Of Evidence.

The argument here being made is potentially dispositive of this entire case. Being raised is the question that, assuming Angelo Lonardo said and did everything the Government's proof attributes to him, what is it about this that makes Angelo Lonardo a conspirator with William Bourjaily?

The law on this point is beyond dispute. A conspiracy and one's membership therein (either as a foundation for the admission of declarations assertedly made in furtherance thereof, or as a criminal offense) cannot be established on the basis of hearsay statements. Rizzio v. United States, 304 F.2d 810, at 826 (8th Cir. 1962). And, just as surely (as argued below, infra, p.23 to 26), the relationship of buyer and seller, in a single transaction such as we have here, is not properly described as conspiratorial.

Distilled, the Government's theory was that Lonardo and Bourjaily were conspirators and that, as such, the various conversations had by Lonardo with Greathouse, the informant, were properly admitted against Bourjaily as statements made in furtherance of such conspiracy. United States v. Enright, 579 F.2d 980 (6th Cir. 1978). Indeed, in rejecting the present

challenge against this evidence, the trial court in denying our specific objections articulated the conclusion that, in his judgment at least: a conspiracy had been shown by a preponderance of the evidence, and that the statements were therefore admissible (Tr. p. 989).

To begin with, as will be argued below, the evidence was grossly insufficient to show that Angelo Lonardo and William Bourjaily were co-conspirators. And, just as surely, the evidence does not show Bourjaily was involved in any way in the pseudo-joint venture then being fostered and promoted by Greathouse and Lonardo, which could impute criminality on any theory to Bourjaily -- with impunity. See, United States v. Elledge, 723 F.2d 864, 866 (11th Cir. 1984).

Dealing specifically with the relationship between Angelo Lonardo and Greathouse in search of definition, several facts seem clear. One, indisputably Greathouse and Lonardo as a team sought to sell a kilogram of cocaine to any purchasers Lonardo could deliver. Thus, even if Bourjaily was to be one of those to whom Lonardo intended to make a sale (and we deny this was proven) such would not put Bourjaily in a conspiratorial relationship with Lonardo as their intent would not be common and could hardly be deemed as anything other than a buyer and seller relationship.

This analysis is fully consistent with the Government thesis under which this case was prosecuted. Indeed the Government in specifically addressing these contentions argued to the trial court (Tr. 973-981) that:

> The Government's position is that the outline of how the conspiracy was to develop during the course of events between May 12th and May 25th were outlined by Lonardo when Lonardo said, "But this coming week I will try to contact some people. See, they don't know who I'm talking to. I don't want them to know."

So from the very beginning, Lonardo has indicated by his conversation that was recorded that the conspiracy would exist, that he would be contacting at least one other person, whether it be two, three or four.

* * *

So the parameters of how the delivery was to take place as part of the agreement was also outlined initially. Greathouse said, "I want half up front. We can sell it for 30." So there is an agreement as to cost.

Greathouse wants his money half up front and they are agreeing to sell the cocaine for $30,000. To show that Lonardo did fulfill his part of the conspiracy, */ that it was existing, on May 24th he indicated that he would have to recontact the people, like he said on the 12th, "I will contact people." He confirmed that he did in fact contact people by his statement on the 24th when he said, "I will have to recontact some people." Lonardo further said on the 24th that the delivery would take place someplace other than the Sheraton hotel. On the 25th we have the conversation, "I have a gentleman friend of mine here now and he has some questions to ask you about the trees."

So independent of what that third, second phone conversation indicated, and outside the credibility of Clarence Greathouse, we have Lonardo saying that he had a gentleman friend here and he wants to talk about cocaine. The third conversation Lonardo said, "I'll be in the lobby, you can bring in the key, the car key, and my friend will be out in his car and I'll just go over and, you know." And we can infer from that that the delivery was to take place in that fashion.

Tr. 985-987. (Emphasis added.)

*/ What counsel for the Government and tragically the Court of Appeals, as well, fail to understand is that no conspiracy could possibly be formed between Lonardo and Greathouse. This is so because an illegal agreement between them so as to make for a conspiratorial relationship was simply not possible. See, United States v. Elledge, supra. Worse yet, they fail to understand that the point of the conversations between Lonardo and Greathouse related to future causes of action and to that extent antedated any possible conspiracy that included Bourjaily as a member.

Again it was on the basis of the facts, which are sufficiently referred to in the various statements made above, that the Court concluded that "a conspiracy did exist" as between Lonardo and Bourjaily and that the "hearsay statements were made in furtherance of the conspiracy" (Tr. 989). In our judgment, the ruling of the Court to the contrary, notwithstanding; it seems clear enough that the circumstances here only show that Lonardo was acting in combination with Greathouse as a seller. Indeed, the conversation about what "we" could sell the cocaine for does not reasonably lend itself to a deal whereby Lonardo was buying the cocaine for himself at one price and selling it for another. The facts show Lonardo's understanding to have been that he and Greathouse were purchasing it for one price and selling it at a higher price and reaping the profit. (Tr. 28-29 and 80-81.)

The legal theory that emerges from these facts, and which must be credited, verifies that Lonardo can only be regarded as a seller and a joint venturer with Greathouse rather than a purchaser from Greathouse. This being so, Lonardo could not in this sense be regarded as having conspired with Bourjaily to purchase as there could be no meeting of the minds in the required sense unless one could conspire with himself to purchase from himself, which is what Lonardo would have had to do.

Even this is not all. If the relationship between Bourjaily and Lonardo was that Bourjaily was going to make a purchase from Lonardo (-- that is, was to be one of those to whom Lonardo would be selling on behalf of himself and Greathouse) this would not put Bourjaily into a conspiratorial relationship with Lonardo and Greathouse. Nor would it put him in a conspiratorial relationship with any other possible purchasers from Lonardo. For as was argued at the trial, at best Bourjaily

would only be a spoke on what could be deemed a wheel that had Lonardo and Greathouse at the hub.

Simply put, the rule relied on by the Court in admitting the evidence herein being assailed was to the effect that any act or declaration by one co-conspirator committed in furtherance of any conspiracy and during its pendency is admissible against each and every co-conspirator. Admittedly, this is so provided a foundation for its reception is laid by independent proof of the conspiracy and the membership therein by the person against whom such evidence is being offered. Crediting this principle, it is at once apparent that the evidence against which we complain failed all tests.

Viewed in this sense, it surely must be that the jury that convicted Bourjaily was able to rely on improper evidence to determine that a conspiracy existed (if, in fact, it showed that) and then use such proof to bootstrap evidence that would otherwise have been inadmissible into proof of guilt. See United States v. Glasser, 315 U.S. 60, 74-75 (1942).

Since the Government's thesis that there was a "conspiracy" permeated this entire trial, a determination by this Court that none was shown to exist that included Bourjaily as a member should perforce automatically require a reversal here as to the substantive counts.

ARGUMENT NO. II

The Admission Of Considerable Evidence Showing The Content Of Various Conversations Had By A Crucial Prosecution Witness With Third Parties (Here, A Non-Testifying Co-Defendant And Another Unknown Person) Violated The Accused's "Right Of Confrontation".

A. What is required for statements made by a non-testifying declarant to be admissible is proof that such statements were made in furtherance of a conspiracy in which the person against whom it is admitted was a member.

We concede that extrajudicial statements made by a non-testifying declarant may be admitted if it is established, by evidence other than such hearsay, that the accused (here, William Bourjaily) was involved in a conspiracy with the declarant (in this case, Angelo Lonardo) and that the statements were made in furtherance of such conspiracy. See Federal Rules of Evidence, Rule 801 (d) (2) (E). This rule, which certainly is not of recent vintage (Lutwak v. United States, 344 U.S. 604 [1953]), does not exist as though oblivious to values implicit in the "accused's right to be confronted by the witnesses against him".

The fact that these values must be reckoned with in a meaningful way was made most clear in California v. Green, 399 U.S. 149 (1970). Here it was noted that "more than once [the Court had] found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception" (id., 155).

In our case we are primarily concerned with the statements and acts of Angelo Lonardo, statements which were made a part of the evidence used to convict Bourjaily. More specifically, and to context this argument, it is undisputed that the evidence includes conversations (some of which were taped) had on various dates between Angelo Lonardo and Clarence Greathouse. The narcotics transaction, which the Government contends specifically involved Bourjaily, took place on May 25, 1984. The question then is, how can the Government justify the admission of evidence concerning the activities and conversations of Angelo Lonardo and Clarence Greathouse prior to this event?

On the other hand, it may suffice simply to note that the only possible proof William Bourjaily and Angelo Lonardo were even acquainted distills from the fact that they obviously conversed before the cocaine was placed in the Bourjaily car. But this fact only shows their "mere association," which is hardly proof of criminal conduct. Stated another way, the fact referred to surely does not establish them as being conspirators, which would make everything Lonardo may have done, and said, imputable to Bourjaily. (See Arguments Made To Trial Court, Tr. pp. 93-97.)

Indeed the very first indication, even remotely resembling evidence, of an acquaintanceship between Angelo Lonardo and William Bourjaily flows from Lonardo's statement to Greathouse that his "friend will be in his car" (Tr. 112-113 & Exhibit 13 [A], Also see Tr. 916), and it turned out later that William Bourjaily was shown to have been in his car in the parking lot. Obviously it is a cogent argument that contends merely because Lonardo made this reference to a "friend" does not prove the reference was to Bourjaily or that he and Bourjaily were conspirators. See United States v. Cantrone, 426 F.2d 902 (2d Cir. 1970).

B. Where evidence originating with a non-testifying declarant is offered against an accused, the prosecution must demonstrate such evidence has an independent "indicia of reliability".

Again, the thrust of petitioner's arguments is that the jury's consideration of the testimony detailing the conversations had between Angelo Lonardo and Clarence Greathouse violated both his right of confrontation and the hearsay rule. In making this argument we rely on the point made in the plurality opinion in Dutton v. Evans, 400 U.S. 74 (1970), that "the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of the facts [has] a satisfactory basis for evaluating the truth of the prior statement." (Id., 89).

The statements made by Angelo Lonardo contained the implied assertion that William Bourjaily was somehow involved with him in the narcotics transaction. The truth of this implication depends not only on whether Angelo Lonardo made the statements, but on whether the statements (if made) were reliable. These questions turn on the answers as to [1] whether there was "a satisfactory basis for evaluation" of their truth (California v. Green, 399 U.S. at 161); [2] whether cross-examination could have possibly exposed the statements, if made, to be unreliable (Dutton v. Evans, 400 U.S., at 89); and [3] whether the statements themselves contained a sufficient "indicia of reliability" (Ibid).

Obviously William Bourjaily, like the defendant in Dutton, was only able to cross-examine the witness (Greathouse), who purportedly was quoting non-testifying declarants on the factual

questions as to whether the witness actually and correctly heard the alleged statements which arguably implicated the accused. However, neither the Government nor the defense were able to cross-examine the alleged declarant.

In the context of this case the confrontation clause guaranteed William Bourjaily, since he could not cross-examine any of the asserted declarants (e.g., Angelo Lonardo), that he (William Bourjaily) should have a satisfactory substitute for testing the accuracy of the statements imputed to such declarant. The Government, under Dutton, was also required to demonstrate that evidence of this type had such an independent "indicia of reliability" that cross-examination would serve no useful purpose. 400 U.S., at 88-89.

What we have here is specific evidence which shows beyond dispute that William Bourjaily was in no way involved in the transactions as a result of which Angelo Lonardo purchased cocaine, or received samples of cocaine, from Clarence Greathouse prior to May 25, 1984.

On the other hand, it is conceded that to a degree some of the statements attributed to Angelo Lonardo were verifiable by the accuracy of the tapes. But even this does not furnish a satisfactory basis for crediting the underlying truth of the statements themselves. And, of course, even if Angelo Lonardo in fact made all of the statements attributed to him, still there are a number of possible reasons for the insertion of the existence of another person referred to as "a friend" of his, which the Government arbitrarily fleshed into being William Bourjaily. These include the idea that Lonardo had his own reasons for wanting to make it known to Greathouse that he would have someone with him.

C. The admission of extrajudicial statements imputed by a prosecution witness to a non-testifying declarant (as having been made in furtherance of the charged conspiracy), which statements were "crucial" to the prosecution and "devastating" to the defense, made for a violation of the right of confrontation.

As to this proposition, it is beyond dispute the same consideration which generates the hearsay rule supports and animates the right of confrontation. Yet, it seems to be all too clear that any apparent similarity of values as between the rule and the right, does not result in the exclusion of all hearsay that may be violative of the confrontation clause, any more than it makes admissible all testimony that qualifies as an acceptable exception to the hearsay rule.

In dealing with this specific point this Court, in California v. Green, 399 U.S. 149, 155 (1970), clearly appears to be saying that merely because certain evidence can be fit into a hearsay exception such does not perforce provide a constitutionally sufficient protection for the right of confrontation.

In our judgment, the absence of an automatic rule of equivalence between the hearsay rule and the right of confrontation requires an assessment here as to the extent to which confrontation values may have been violated by the admission against Bourjaily of the statements made, and supposedly made, by Lonardo and some unidentified declarant. Here of course, it is obvious Angelo Lonardo, one of the asserted declarants, could not be subjected to cross-examination. This

would have at least exposed his demeanor, and possible lack of credibility, to the scrutiny of the jury. Hence, the "mission" of the confrontation clause (usually insured by cross-examination) could not be vindicated here.

However, it is also true that a failure to serve this confrontation value may not be fatal where the hearsay testimony is neither "crucial" to the prosecution, nor "devastating" to the defense. Dutton v. Evans, 400 U.S., at 85, 87 (1970). Of course, it could not be more obvious that the evidence assailed here was both "crucial" and "devastating". Not only this, unlike the statements made in Dutton, the statements made here were not spontaneous, but were in the form of an expressed assertion that in no way carried with it a caution against it being given undue weight (id., 87-89).

For these reasons the admission of these assailed statements must be viewed as a violation of the confrontation clause.

ARGUMENT NO. III

A Conspiracy To Violate The Narcotics Laws Is Not Properly Inferred From Facts Which At Best Only Show A Single Isolatable Transaction Between A Purchaser And A Seller, Where The Latter Was Acting For And On Behalf Of Himself And A Government Informant (Who Actually Supplied The Contraband Involved).

In this case the original indictment charged Lonardo and Bourjaily with involvement in a conspiracy dating from May 1[illegible], 1984 to the date of the indictment. Of course, it is now clear this was done so as to facilitate the Government's use as evidence against Bourjaily, of conversations supposedly had between Lonardo and Greathouse that did not in any way involve Bourjaily.

The fact that the Government at all times knew Lonardo was acting as an agent for Clarence Greathouse, the informant, and that the effort Lonardo was ostensibly making was to sell the drugs for Greathouse, really makes our point. Clearly then it can only be that Lonardo was a seller of these drugs not a purchaser thereof from Greathouse. Simply put, we are indeed here contending that the facts only showed Lonardo was clearly making the effort to sell these drugs for himself and Greathouse (Tr. 28-29 and 80-81) or for himself at a price higher than what he would have to pay Greathouse. This hardly puts one who would only be a purchaser from Lonardo into a conspiratorial relationship with Lonardo or anyone else who might also buy from Lonardo.

All this aside, the most crucial aspect of the conspiracy issues in this case (-- that is, as a predicate for the admission of statements supposedly made in furtherance thereof, and as

proof of a conspiracy offense) deals specifically with the sufficiency of the Government's proof of a conspiracy. Here, we start with the rather basic tenet that the mere purchase of contraband by one party from another is insufficient to prove the existence of a conspiracy as between such parties. Indeed, as the Second Circuit cogently recognized in a comparable situation:

> The purchase of the cocaine from Mauro was not enough to prove a conspiracy in which Mauro and the appellant participated. They had no agreement to advance any joint interest. The appellant bought at a stated price and was under no obligation to Mauro except to pay him that price. The purchase alone was insufficient to prove the appellant a conspirator with Mauro and those who were his co-conspirators.

United States v. Koch, 113 F. 2d 982, 983 (2d Cir. 1940). Also See United States v. Zeuli, 137 F.2d 845 (2d Cir. 1943).

So postured, the admission against Bourjaily of the Greathouse-Lonardo conversations had before May 25th stands on even less footing. For no connection between Lonardo and Bourjaily has even been suggested by the Government as being in existence before that date. In fact, the total range of the proven contacts as between Lonardo and Bourjaily does not establish there had even been an acquaintanceship between them prior to this date.

United States v. Ford, 324 F.2d 950 (7th Cir. 1963), is another case adopting the Koch analysis. In Ford, the Court likewise concluded that "the relationship of buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy to sell, receive, barter or dispose of ... [contraband]." Id., at 952. Also See United States v. DeNoia, 451 F.2d 979, at 981 (2d Cir. 1971) and United States v. Sperling, 506 F.2d 1323, at 1342 (2d Cir. 1974).

Indeed our own Court, in United States v. Grunsfeld, 558 F.2d 1231 (6th Cir. 1977), at least recognized the apparent validity of the argument that "a buyer-seller relationship is not

alone sufficient to tie a buyer to a conspiracy" (id., at 1235). While the trial Court rejected the argument as postured by the facts in Grunsfeld, it is at least arguable that the Court would have done otherwise had it been unable to "conclude that all of ... [the] circumstances distinguish the involvement ... [in that case] from that of a mere casual sale by someone who was unaware of the scope of the conspiracy" (id., at 1235).

In the wake of the above arguments, we contend the Court below failed to understand that the essential question in this case turned on whether an ultimate purchase by Bourjaily of an indeterminate quantity of cocaine from Lonardo was "the kind of single transaction which itself supports an inference of knowledge of a broader conspiracy" that could be imputed to Bourjaily. See United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974). Here, it should be noted that in the Sperling case the Court was careful to point out that there were certain types of single acts that could be sufficient for that purpose. On this precise thesis the Court articulated the idea that:

> For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal narcotic laws, there must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself must be one from which such knowledge may be inferred.

Id., 1342.

What is significant is that if the single act of actually delivering cocaine to another person, the situation in Sperling, was insufficient to transform that act into a conspiratorial relationship, the question then is what is present here that takes this situation out of the ambit of the stated principle. Also See United States v. Solomon, 686 F.2d 863 (11th Cir. 1982), and United States v. Torres, 503 F.2d 1120 (2d Cir. 1974).

Viewed from still another posture, the Record here simply fails to show any unusual circumstances from which it could be inferred that these parties (including Bourjaily) agreed to further some joint interest. Indeed, the absence of any "stake in the venture" Lonardo had with Greathouse cannot be regarded as irrelevant to the question of conspiracy. This being so, the critical issues raised under this argument surely must be resolved in favor of this petitioner.

ARGUMENT NO. IV

A Conspiracy To Violate The Narcotics Laws And A Related Illegal Possession Charge Are Not Established By Proof That Does Not Furnish A Constitutionally Sufficient Basis To Support A Finding Of Guilt Beyond A Reasonable Doubt.

In this case our petitioner, William Bourjaily, seriously urges that the evidence against him is, and was, insufficient as a matter of law to support his convictions. Granted, in assessing this contention the Court will view the evidence in the light most favorable to the Government. Glasser v. United States, 315 U.S. 60 (1942).

Be all that as it may, our concentration on this issue starts with the flat-out contention that the evidence bearing on sufficiency issues cannot properly include the considerable testimony admitted by the Court on the theory that a conspiracy existed as between William Bourjaily and his co-defendant at the trial -- Angelo Lonardo. This evidence, needless to say, was admitted over our objections.

At least this much seems clear enough, before admitting the evidence here being referred to against William Bourjaily (--

here, the considerable evidence based on conversations between Lonardo and Greathouse), the applicable rule required that the non-hearsay testimony should have demonstrated, by a fair preponderance, that William Bourjaily participated in a conspiracy with Lonardo. The fact that no conspiracy can be said to have existed as between Lonardo and Greathouse, United States v. DeBright, 742 F.2d 1196 (9th Cir. 1984), really puts the issue here in its proper perspective. Also See United States v. Elledge, 723 F.2d 864, 866 (11th Cir. 1984) and United States v. Renfro, 620 F.2d 569, 575 and n. 5 (6th Cir. 1980).

All this being so, we are faced with certain indisputable facts. One, there was no evidence that William Bourjaily accompanied Angelo Lonardo to the hotel or knew of his dealings or arrangements (past or present) with Greathouse. And, two, there certainly was no evidence he knew of Lonardo's intent to pick-up the kilogram of cocaine. What the evidence did show as against William Bourjaily in this connection was his presence in the parking lot. There he was later joined by Lonardo who caused the package to be in Bourjaily's car where it was found by the agents along with a package of Twenty Thousand Dollars ($20,000.00) plus. This evidence is really beyond dispute.

Thus it should suffice to note that Bourjaily's actions were at least as consistent with innocence as with guilt and, as such, does not lead to any fair inference implicating him in any conspiracy with Lonardo. Stated another way, the conclusion that the non-hearsay evidence proffered by the Government at best would support only the speculative conclusion that Bourjaily was a conspirator seems inescapable.

If this conclusion is valid, then surely the admission of the evidence being centralized was a serious violation of Rule 801 (d) (2) (E) that was prejudicial to a fault. This being so, it perforce follows that the conspiracy conviction itself must

surely fall in the wake of these cogent determinations. Even this is not all, the admission of this evidence, which also included the statement made by Lonardo that his friend would be outside in the car (Exhibit 13 [A]), surely prejudiced the jury's consideration of the possession charge.

(B)

In this case, to prove the charged possession with intent to distribute, it was necessary for the Government to present evidence showing William Bourjaily (1) knowingly (2) possessed the cocaine involved in this case (3) with the intent to distribute it. See 21 U.S.C. §841 (a). The relevant inquiry turns on whether Bourjaily had an "appreciable ability to guide the destiny of the drug[s]," United States v. Staten, 581 F.2d 878 (D.C. Cir. 1978).

Perhaps it will be conceded by counsel opposite that, while an individual can surely possess contraband jointly with another, one's mere presence in, or operation of, a car when drugs are placed therein, or even one's association with one whose possession is established, is insufficient to establish the type of possession needed for a conviction. Id., at 884. Indeed, the Government may also concede that proof merely that a package containing drugs (here, cocaine) was placed in Bourjaily's car by Lonardo, or was handed to Bourjaily who placed it in the car himself, does not eliminate the need for proof that the accused had knowledge of the content of the package.

So postured, the validity of William Bourjaily's conviction on possession with intent to distribute depends upon whether the proof adduced was sufficient to show Bourjaily knew the cocaine was contained in the package when he acquired actual possession -- if he ever did. In our judgment even when one assesses this

evidence most favorable to the Government, as this Court will surely do, the evidence must still be deemed too slim a reed upon which to predicate a criminal conviction. On the other hand, while the proof probably reveals some type of an association (and that's all it reveals) between William Bourjaily and Angelo Lonardo, and may even arguably raise a plausible suspicion of a criminal association by William Bourjaily with Lonardo (whose actual possession of the cocaine has been conceded, indeed, was not even contested); this is hardly the kind of stuff proof beyond a reasonable doubt is made of. See United States v. Jackson, 588 F.2d 1046, 1056 (5th Cir. 1979).

For this reason, and others that will surely occur to the Court, William Bourjaily's conviction on possession with intent to distribute should likewise be reversed for insufficiency of the evidence. See Burk v. United States, 437 U.S. 1 (1978).

CONCLUSION

Perhaps the most unfortunate aspect of this cause was the failure of the Sixth Circuit to recognize that our contentions were two-fold with reference to almost the entirety of the evidence supplied by and through the Government's lackey, Clarence Greathouse. Specifically, it was claimed that the evidence referred to was inadmissible hearsay within the meaning of Rule 801 (d) (2) (E). And, its admission was also improper because it offended the confrontation clause.

The Government's similar failure, in its Brief, to indicate with any specificity the names or identities of "the conspirators" it relies on and the ends furthered by Lonardo's conversations with Greathouse, which made Lonardo's statements admissible against William Bourjaily will emphasize our point.

For our part, if only one question is considered by this Court, this should be the one. For with its analysis will come an inescapable conclusion. Simply put, this cause must be reviewed and its tenets must be rejected.

Respectfully submitted,

JAMES R. WILLIS, ESQ.
Attorney for Petitioner
Suite 610, Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
(216) 523-1100

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ Of Certiorari was mailed to the office of Kenneth S. McHargh, Assistant U.S. Attorney, Northern District of Ohio, 1404 East Ninth Street, Suite 600, Cleveland, Ohio 44114, this 15th day of April, 1986.

JAMES R. WILLIS, ESQ.
Attorney for Petitioner

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

William John BOURJAILY,
Defendant-Appellant.

No. 85-3058.

United States Court of Appeals,
Sixth Circuit.

Argued Nov. 4, 1985.

Decided Jan. 15, 1986.

Defendant was convicted in the United States District Court for the Northern District of Ohio, White, J., of conspiracy to distribute and possession with intent to distribute cocaine, and he appealed. The Court of Appeals, Boyce F. Martin, Jr., Circuit Judge, held that: (1) codefendant's statements were admissible against defendant under coconspirator exception to hearsay rule; (2) admission of those statements did not violate defendant's confrontation right; and (3) evidence was sufficient to sustain conviction.

Affirmed.

1. Criminal Law ⇐427(3)

Determination as to whether evidence is admissible under coconspirator exception to hearsay rule need not be made at time questionable evidence is offered; rather, court may wait until government's case is complete before making findings and ruling on admissibility of evidence. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

2. Criminal Law ⇐427(4)

Statements at issue may be considered by court in determining whether statements are admissible under coconspirator exception to hearsay rule. Fed.Rules Evid. Rule 801(d)(2)(E), 28 U.S.C.A.

3. Criminal Law ⇐422(1)

Statements of codefendant in drug prosecution were admissible against defendant under coconspirator exception to hearsay rule; evidence showed that conspiracy existed for codefendant to facilitate drug transaction between police informant and defendant, that defendant, who accepted drugs in hotel parking lot, was part of conspiracy, and that statements were made in furtherance of conspiracy. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

4. Criminal Law ⇐662.11

Admission of codefendant's out-of-court statements in prosecution of defendant on drug charges, under coconspirator exception to hearsay rule, did not violate defendant's confrontation right, even though defendant could not confront or cross-examine codefendant, who exercised his right not to testify; reliability was established by fact that statements fell squarely within well-established hearsay exception, and codefendant's refusal to testify rendered him unavailable. U.S.C.A. Const.Amend. 6; Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

5. Criminal Law ⇐662.8, 662.9

Defendant's right to confrontation is protected if hearsay statement sought to be used against defendant has sufficient indicia of reliability and if declarant is unavailable; reliability prong of test is satisfied where statement falls within firmly rooted hearsay exception, but availability must be separately proved. U.S.C.A. Const.Amend. 6.

6. Conspiracy ⇐23

Essential elements of conspiracy are that conspiracy was willfully formed, that defendant willfully became member of conspiracy, and that one conspirator committed at least one overt act in furtherance of that conspiracy.

7. Conspiracy ⇐44½, 47(2)

Drug distribution conspiracies are often "chain" conspiracies such that agreement can be inferred from interdependence of enterprise, i.e., one can assume that participants understand that they are participating in joint enterprise because success is dependent on success of those from whom they buy and to whom they sell; circumstantial evidence is sufficient to show this agreement.

8. Conspiracy ⇐47(12)

In prosecution for conspiracy to distribute cocaine, evidence that defendant, with codefendant acting as "middleman," took cocaine which codefendant was delivering from police informant, after negotiations between informant and defendant through codefendant, was sufficient to sustain conviction. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

9. Conspiracy ⇐44½

Large volume of narcotics involved in transaction creates inference of drug conspiracy.

10. Drugs and Narcotics ⇐118

In prosecution for possession with intent to distribute cocaine, evidence that defendant, in hotel parking lot, accepted kilogram of cocaine which codefendant had transferred from police informant to defendant, and that $19,000 in cash was found in defendant's car, was sufficient to sustain conviction. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

James R. Willis, argued, Cleveland, Ohio, for defendant-appellant.

Ronald B. Bakeman, Asst. U.S. Atty., Cleveland, Ohio, Gregory C. Sasse, argued, Asst. U.S. Atty., for plaintiff-appellee.

Before LIVELY, Chief Circuit Judge, and MARTIN and JONES, Circuit Judges.

BOYCE F. MARTIN, Jr., Circuit Judge.

William Bourjaily appeals his convictions for conspiracy to distribute and possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1),[1] 21 U.S.C. § 846[2]

1. 21 U.S.C. § 841(a)(1) provides the following:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

2. See note 2 on page 541.

and 18 U.S.C. § 2.[3] Bourjaily claims that statements of his codefendant, Angelo Lonardo, should not have been admitted as statements of a co-conspirator as provided by Rule 801(d)(2)(E) of the Federal Rules of Evidence. Because Lonardo exercised his right not to testify at trial, Bourjaily claims that even if Lonardo's statements were admissible under Rule 801(d)(2)(E), allowing the statements into evidence violated his sixth amendment right to confrontation. Bourjaily also claims that the evidence was insufficient to support findings of conspiracy and possession.

The majority of the evidence in this case was presented by testimony of FBI agents; testimony of an FBI informant, Clarence Greathouse; and several recordings of cryptic conversations between Greathouse and the codefendant, Angelo Lonardo. Greathouse testified that he arranged for a transfer of one kilogram of cocaine to Angelo Lonardo to be sold by "people" Lonardo was to select. On May 12, 1984, Greathouse, equipped with a body recorder, met with Lonardo to discuss the possibility of a sale. In this taped conversation, Lonardo indicated that he had talked to "the people" and they were interested. He then stated that the deal would be handled as had been done in the past. Later in the conversation, Lonardo said that he would "try to set some people up." He stated that his contacts did not know that Greathouse was his supplier and Lonardo wanted to keep it that way. Greathouse demanded one-half of the purchase price before delivery and requested that each of Lonardo's buyers purchase at least one-fourth of a kilogram. Lonardo agreed.

Greathouse testified that on May 17, 1984, he asked Lonardo for money and Lonardo responded that he would get in touch with "some people" and recontact Greathouse. He called Greathouse on May 19 to arrange for delivery of the money and the delivery occurred. Several other conversations occurred in the next few days as the deal was being finalized. All of these conversations were recorded. On May 24, Lonardo met Greathouse at the Sheraton Hopkins Hotel outside of Cleveland. Greathouse told Lonardo that the cocaine had arrived. In a taped conversation, Lonardo said that he would try to contact some people but that he had told them the deal was off because of a purchase price misunderstanding.

On May 25, Lonardo, in a taped telephone conversation, told Greathouse he had a "gentleman friend" present who "had some questions" to ask Greathouse. Lonardo indicated that he wanted Greathouse to call back immediately. The second call was not recorded but FBI agent Dorton listened to both sides of the conversation. Greathouse testified that he discussed how the gentleman was to pay, as well as the quality, the purity, the formation and the clarity of the cocaine. Agent Dorton confirmed that these topics were discussed. Later that day, in a taped conversation, Lonardo told Greathouse to park his car behind the Hilton Hotel and that Lonardo would be waiting for him in the lobby. Lonardo stated, "My friend will be out in his car and I'll just go over and you know."

FBI agents Fiatal and Dorton placed four quarter-kilogram bags of cocaine in a Sheraton laundry bag in Greathouse's car. Greathouse parked at the Hilton, entered

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.
Cocaine is a controlled substance.

2. 21 U.S.C. § 846 provides the following:
Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

3. 18 U.S.C. § 2 states the following:
(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

and stood next to Lonardo. FBI agents Fiatal and Dorton testified that William Bourjaily was in the parking lot in a white car which was facing away from the hotel. Other FBI agents in a surveillance van stationed in the parking lot prior to Greathouse's arrival had observed Bourjaily drive around the parking lot, stop in different areas and examine the vehicles parked there. The agents stated that Bourjaily's car was at the end of the parking lot farthest from the hotel entrance when Greathouse arrived.

Greathouse arrived, entered the Hilton and gave Lonardo the keys to his car. Lonardo took the keys, walked to Greathouse's car, circled the car and walked to Bourjaily's car. Lonardo then walked back to Greathouse's car, unlocked the door, reached under the seat and removed the cocaine. As Lonardo neared Greathouse's car, Bourjaily turned his car around in the parking lot and moved to a point near Greathouse's car. Lonardo took the cocaine from the car and walked to Bourjaily's car. At least one FBI agent saw Lonardo hand the package of cocaine to Bourjaily and saw Bourjaily accept it. The FBI agents then arrested Bourjaily and Lonardo and recovered the cocaine from Bourjaily's car. They found, under Bourjaily's passenger seat, a leather bag containing $19,000 in cash. A receipt found in the bag was made out to Bill Bourjaily. They also found $2,000 in the glove compartment.

[1-3] We believe the trial judge was correct in allowing Lonardo's statements to be admitted as statements of a co-conspirator as provided by Rule 801(d)(2)(E) of the Federal Rules of Evidence, which states:

(d) Statements which are not hearsay. A statement is not hearsay if—
....
(2) Admission by party-opponent. The statement is offered against a party and is ...
(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

We have held that in order to have a coconspirator's testimony admitted, it must be shown by a preponderance that a conspiracy existed, that the defendant against whom the hearsay is offered was a member of the conspiracy, and that the statement in question was made in furtherance of the conspiracy. *United States v. Vinson*, 606 F.2d 149, 152 (6th Cir.1979), *cert. denied*, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980); *United States v. Enright*, 579 F.2d 980, 986 (6th Cir.1978). This determination need not be decided at the time the questionable evidence is offered. Rather, as the trial court here did, the court may wait until the United States' case is complete before making findings and ruling on its admissibility. *Vinson*, 606 F.2d at 153. The statements at issue may be considered by the court in determining whether the *Enright* requirements are satisfied.[4] *Id.* Here the court specifically found that the *Enright* requirements had been satisfied. We find no procedural error.

Substantively, the trial judge did not err in finding that the government had proved by a preponderance of the evidence that the *Enright* requirements were satisfied. Lonardo's conversations with Greathouse establish that Greathouse was to supply the cocaine and Lonardo was to line up buyer-distributors and to obtain partial payment from them. The conspiracy and Bourjaily's membership in it was preponderantly proved by these conversations, by Greathouse's telephone discussion with Lonardo's "friend" about the quality of the cocaine, and Lonardo and Bourjaily's actions in the Hilton parking lot. After talking with Lonardo, Bourjaily pulled his car nearer Greathouse's car so that the cocaine could be transferred by Lonardo easily. Bourjaily then accepted the cocaine from Lonardo. Lonardo's statements were made in furtherance of the conspiracy because they were recorded from conversations be-

4. The Supreme Court denied certiorari on this issue in *Means v. United States*, — U.S. —, 105 S.Ct. 541, 83 L.Ed.2d 429 (1984). *See also United States v. Martorano*, 561 F.2d 406, 408 (1st Cir.1977), *cert. denied*, 435 U.S. 922, 98 S.Ct. 1484, 55 L.Ed.2d 515 (1978).

tween Lonardo and Greathouse in which they planned, negotiated, and organized the transaction.

[4] Admission of Lonardo's statements does not violate Bourjaily's sixth amendment right of confrontation, though Bourjaily could not confront or otherwise cross-examine Lonardo because Lonardo exercised his right not to testify. In *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Supreme Court held that the defendant's right to confrontation is protected if the hearsay statement sought to be used against the defendant has sufficient indicia of reliability and if the declarant is unavailable. *Id.* at 65–66, 100 S.Ct. at 2538–2539. The *Roberts* court stated that "reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.* at 66, 100 S.Ct. at 2539. Rule 801(d)(2)(E) provides that statements of co-conspirators are not hearsay for purposes of the rules. However, these statements are out-of-court assertions offered for their truth "and thus resting for ... [their] value upon the credibility of the out-of-court asserter." C. McCormick, *Handbook of the Law of Evidence*, § 246 at 584 (1972). These statements are thus traditionally considered hearsay and squarely covered by the *Roberts* requirements. *See* Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U.Fla.L.Rev. 207, 229 (1984).

The circuits are split on the analysis to be followed in dealing with co-conspirator's statements.[5] Several circuits have adopted an approach in which co-conspirator statements admitted under Rule 801(d)(2)(E) are analyzed on a case-by-case basis for reliability and availability. *See United States v. DeLuna*, 763 F.2d 897, 909–10 (8th Cir. 1985); *United States v. Ammar*, 714 F.2d 238, 254–57 (3d Cir.), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983); *United States v. Perez*, 658 F.2d 654, 660 & n. 5 (9th Cir.1981); *United States v. Wright*, 588 F.2d 31, 37–38 (2d Cir.1978), *cert. denied*, 440 U.S. 917, 99 S.Ct. 1236, 59 L.Ed.2d 467 (1979).

We have held that evidence admitted as a co-conspirator's statement under Rule 801(d)(2)(E) automatically satisfies the sixth amendment requirements. *Boone v. Marshall*, 760 F.2d 117, 119 (6th Cir.1985); *United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir.1984); *United States v. Marks*, 585 F.2d 164, 170 n. 5 (6th Cir. 1978); *United States v. McManus*, 560 F.2d 747 (6th Cir.1977), *cert. denied*, 434 U.S. 1047, 98 S.Ct. 894, 541 L.Ed.2d 798 (1978); *Campbell v. United States*, 415 F.2d 356 (6th Cir.1969). *Accord United States v. Lurz*, 666 F.2d 69, 80–81 (4th Cir.1981), *cert. denied*, 455 U.S. 1005, 102 S.Ct. 1642, 71 L.Ed.2d 874 (1982); *United States v. Papia*, 560 F.2d 827, 836 & n. 3 (7th Cir.1977); *Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir.1972), *cert. denied*, 409 U.S. 1128, 93 S.Ct. 948, 35 L.Ed.2d 260 (1973). However, none of these cases discuss the implications of the two-pronged test of *Roberts* on our analysis.

[5] In *Fuson v. Jago*, 773 F.2d 55 (6th Cir.1985), another approach was used which applied *Roberts*. In *Fuson* a separate finding of unavailability was made and the panel held that the 801(d)(2)(E) provision represented a "well established" hearsay exception. *Fuson*, 773 F.2d at 59. Though the *Fuson* Court ultimately found that the statement in question did not fit within the exception, we think the bifurcated analysis is proper and more in accord with the *Roberts* requirements. As implied in *Fuson*, the reliability prong of the *Roberts* analysis is supplied by satisfaction of Rule 801(d)(2)(E), a well-established hearsay exception. Availability must be separately proved. *Accord United States v. Peacock*, 654 F.2d 339, 349–50 (5th Cir. 1981), *cert. denied*, 464 U.S. 965, 104 S.Ct. 404, 78 L.Ed.2d 344 (1983).

Because we find that Lonardo's statements were properly admitted under Rule

5. The Supreme Court denied certiorari in a case presenting this precise issue. *See Sanson v. United States*, — U.S. —, 104 S.Ct. 3559, 82 L.Ed.2d 861 (1984).

801(d)(2)(E), reliability is proved. Lonardo, the declarant and Bourjaily's codefendant, was unavailable because he refused to testify. In *Mayes v. Sowders*, 621 F.2d 850, 855 (6th Cir.), *cert. denied*, 449 U.S. 922, 101 S.Ct. 324, 66 L.Ed.2d 151 (1980), we stated:

> A witness is not available for full and effective cross-examination when he or she refuses to testify. *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Nelson v. O'Neil*, 402 U.S. 622, 91 S.Ct. 1723, 29 L.Ed.2d 222 (1971). This is equally true whether the refusal to testify is predicated on privilege or is punishable as contempt, so long as the refusal to testify is not procured by the defendant. *Douglas v. Alabama*, *supra*, 380 U.S. at 420, 85 S.Ct. at 1077; *Motes v. United States*, 178 U.S. 458, 471, 20 S.Ct. 993, 998, 44 L.Ed. 1150 (1900); *United States v. Mayes*, 512 F.2d 637, 650–52 (6th Cir.), *cert. denied*, 422 U.S. 1008, 95 S.Ct. 2629, 45 L.Ed.2d 670 (1975).

621 F.2d at 856. *See Rice v. Marshall*, 709 F.2d 1100, 1102 (6th Cir.1983), *cert. denied*, 465 U.S. 1034, 104 S.Ct. 1304, 79 L.Ed.2d 703 (1984). Clearly, Lonardo's refusal to testify made him unavailable.

[6, 7] Bourjaily's final claim is that the evidence adduced at trial was insufficient to support a finding by the jury that conspiracy to distribute cocaine and possession of cocaine were proved beyond a reasonable doubt. The standard now generally applied in determining the sufficiency of the evidence at trial is "whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979); *United States v. Gallo*, 763 F.2d 1504, 1508 (6th Cir.1985). The essential elements of conspiracy are that the conspiracy was willfully formed, that the defendant willfully became a member of the conspiracy, and that one of the conspirators committed at least one overt act in furtherance of the conspiracy. *United States v. Thompson*, 533 F.2d 1006, 1009 (6th Cir.), *cert. denied*, 429 U.S. 939, 97 S.Ct. 353, 50 L.Ed.2d 308 (1976). For conviction, Bourjaily must have been shown to have agreed to participate in what he knew to be a joint venture to achieve a common goal. *United States v. Warner*, 690 F.2d 545, 549 (6th Cir.1982); *United States v. Martino*, 664 F.2d 860, 876 (2d Cir.1981), *cert. denied*, 458 U.S. 1110, 102 S.Ct. 3493, 73 L.Ed.2d 1373 (1982). However, actual agreement need not be proved. Drug distribution conspiracies are often "chain" conspiracies such that agreement can be inferred from the interdependence of the enterprise. *Warner*, 690 F.2d at 549; *United States v. Sutherland*, 656 F.2d 1181, 1195–96 (5th Cir.1981), *cert. denied*, 455 U.S. 949, 102 S.Ct. 1451, 71 L.Ed.2d 663 (1982). One can assume that participants understand that they are participating in a joint enterprise because success is dependent on the success of those from whom they buy and to whom they sell. *Warner*, 690 F.2d at 549; *Martino*, 664 F.2d at 876. Circumstantial evidence is sufficient. *Thompson*, 533 F.2d at 1009.

[8, 9] Viewing the evidence before us in the light most favorable to the United States, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we hold that there was sufficient evidence from which the rational jury member could have found beyond a reasonable doubt that Bourjaily was a willful member of a conspiracy to distribute cocaine and that the accompanying overt acts were committed by the conspirators. The evidence established that Bourjaily took the cocaine from Lonardo in the Hilton parking lot. The additional evidence of Lonardo's actions in lining up buyers, and Lonardo's conversations with Greathouse is supportive of the conspiracy finding. Lonardo called Greathouse so that his "friend" could discuss the deal with him. Greathouse spoke with this "friend" about the quality of the cocaine. Lonardo later said "his friend" would be in the Hilton parking lot. Even if the evidence of Bourjaily taking the cocaine from

Lonardo is only evidence of a sale, there is additional evidence from which knowledge of the conspiracy may be inferred. *United States v. Grunsfeld*, 558 F.2d 1231, 1235 (6th Cir.1977), *cert. denied*, 434 U.S. 872, 98 S.Ct. 219, 54 L.Ed.2d 152 (1978). *United States v. Mayes*, 512 F.2d 637, 647 (6th Cir.), *cert. denied*, 422 U.S. 1008, 95 S.Ct. 2629, 45 L.Ed.2d 670 (1975). Further, one kilogram of cocaine was involved. A large volume of narcotics creates an inference of a conspiracy. *Grunsfeld*, 558 F.2d at 1235; *United States v. Aiken*, 373 F.2d 294, 300 (2d Cir.), *cert. denied*, 389 U.S. 833, 88 S.Ct. 32, 19 L.Ed.2d 93 (1967).

[10] Likewise, a rational trier of fact could find that possession a necessary finding for a violation of 21 U.S.C. § 841(a)(1), was proved beyond a reasonable doubt. An FBI agent testified that he saw Lonardo give Bourjaily the cocaine and that Bourjaily accepted it. Immediately thereafter, Bourjaily was arrested and the cocaine was found in the passenger portion of his car. Bourjaily's contention that he did not know that the substance was cocaine is meritless in light of the money found in his car, Lonardo's statements, and the phone call Greathouse had with Lonardo's "friend."

We affirm.

Supreme Court of the United States

No. A-685

WILLIAM JOHN BOURJAILY,

Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 15, 1986.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 10th day of March, 1986.

ORIGINAL

No. 85-6725

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM JOHN BOURJAILY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether co-conspirator statements were properly admitted at trial under Fed. R. Evid. 801(d)(2)(E) and the Confrontation Clause.

2. Whether the evidence was sufficient to support petitioner's convictions.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 781 F.2d 539.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1986. Justice O'Connor extended the time for filing a petition for a writ of certiorari to April 15, 1986, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent prison terms of 15 years and to a three-year special parole term on the substantive count. The court of appeals affirmed (Pet. App. A1-A7).

The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A3-A4). It showed that FBI informant Clarence Greathouse arranged for a transfer of one kilogram of

cocaine to co-defendant Angelo Lonardo to be sold by people Lonardo was to select. On May 12, 1984, Greathouse, equipped with a body recorder, met with Lonardo to discuss the possibility of a sale. In this taped conversation, Lonardo indicated that he had talked to "the people" and they were interested. He then stated that the deal would be handled as had been done in the past. He stated that his contacts did not know that Greathouse was his supplier and that he wanted to keep it that way. Greathouse demanded one-half of the purchase price before delivery and requested that each of Lonardo's buyers purchase at least one-fourth of a kilogram. Lonardo agreed. Id. at A3.

On May 17, 1984, Greathouse asked Lonardo for money. Lonardo responded that he would get in touch with "some people" and contact Greathouse again. Lonardo called Greathouse on May 19 to arrange delivery of the money, and the delivery occurred. Greathouse and Lonardo had several other conversations as the deal was being finalized. On May 24, Greathouse told Lonardo that the cocaine had arrived. In a taped conversation, Lonardo said that he would try to contact some people but that he had told them that the deal was off because of a misunderstanding about the purchase price. Pet. App. A3.

In a taped telephone conversation on May 25, Lonardo told Greathouse that he had a "gentleman friend" present who "had some questions" to ask Greathouse. Lonardo indicated the he wanted Greathouse to call back immediately. The second call was not recorded, but Agent Dorton of the FBI listened to both sides of the conversation. Greathouse spoke directly with Lonardo's "gentleman friend" (Tr. 167-168). Greathouse testified that he discussed how the "gentleman" was to pay, as well as the quality, purity, formation, and clarity of the cocaine. Agent Dorton confirmed that Greathouse spoke with a person other than Lonardo (Tr. 754) and that these topics were discussed. The "gentleman friend" told Greathouse that he would pay $15,000 "up front" and the balance after the cocaine was tested (Tr. 168). Later that

day, Lonardo told Greathouse in a taped conversation to park his car behind the Hilton Hotel, where Lonardo would be waiting for him in the lobby. Lonardo stated, "My friend will be out in his car and I'll just go over and you know." Pet. App. A3.

Thereafter, FBI agents placed four quarter-kilogram bags of cocaine in Greathouse's car. When Greathouse arrived at the Hilton, petitioner was in a car in the parking lot. Petitioner had driven around the parking lot, examining the parked vehicles. Greathouse entered the Hilton and gave Lonardo the keys to his car. Lonardo walked to Greathouse's car, circled it, and then walked to petitioner's car. Lonardo then walked back to Greathouse's car and removed the cocaine. As Lonardo neared Greathouse's car, petitioner turned his car around and moved to a point near Greathouse's car. Lonardo took the cocaine from Greathouse's car and handed it to petitioner, who accepted it. The agents then arrested petitioner and Lonardo and recovered the cocaine from petitioner's car. They found $19,100 under the passenger seat of petitioner's car and $1000 in the glove compartment. Pet. App. A1-A4.

ARGUMENT

1. Petitioner contends that Lonardo's tape-recorded statements to Greathouse were improperly admitted as co-conspirator declarations (Pet. 12-16) and that the use of those statements violated the Confrontation Clause of the Constitution (Pet. 17-22). These claims are without merit.

a. Under the co-conspirator rule, Fed. R. Evid. 801(d)(2)(E), in order to obtain the admission of co-conspirator declarations the government must show by a preponderance of the evidence that a conspiracy existed, that the defendant against whom the hearsay is offered was a member of the conspiracy, and that the declarations in question were made in furtherance of the conspiracy. See, e.g., United States v. Vinson, 606 F.2d 149, 152 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980); United States v. James, 590 F.2d 575, 582 (5th Cir.) (en banc), cert.

denied, 442 U.S. 917 (1979). Petitioner argues that the evidence at trial failed to establish that he and Lonardo were co-conspirators.

In rejecting this claim, the court of appeals relied in part on the evidence of Lonardo's out-of-court statements themselves (Pet. App. A4). In so doing, the court of appeals followed its own consistent precedent holding that Fed. R. Evid. 104(a) 1/ modifies prior law and permits a trial court to give some consideration to the substance of an alleged co-conspirator's declaration in determining whether the factual predicate for admission of co-conspirator statements has been met. 2/ Other authority supports the Sixth Circuit's analysis of the effect of Rule 104(a). 3/ The Sixth Circuit's position is still the minority view, however. See Means v. United States, No. 83-6866 (Nov. 26, 1984) (White, J., dissenting from denial of certiorari); Arnott v. United States, 464 U.S. 948 (1983) (White, J., dissenting from denial of certiorari).

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1 Fed. R. Evid. 104 provides in pertinent part:

> (a) Questions of admissibility generally. Preliminary questions concerning * * * the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

2/ United States v. Means, 729 F.2d 1462 (6th Cir.), cert. denied, No. 83-6866 (Nov. 26, 1984); United States v. Piccolo, 723 F.2d 1234, 1240 & n.1 (6th Cir. 1983) (en banc), cert. denied, 466 U.S. 970 (1984); United States v. Shoun, 714 F.2d 143 (6th Cir. 1983), cert. denied, 465 U.S. 1012 (1984); United States v. Arnott, 704 F.2d 322, 325 (6th Cir.), cert. denied, 464 U.S. 948 (1983); United States v. Cassity, 631 F.2d 461, 464 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980); United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979), cert. denied, 444 U.S. 1074 and 445 U.S. 904 (1980); United States v. Enright, 579 F.2d 980, 985 n.4 (6th Cir. 1978).

3/ United States v. Martorano, 561 F.2d 406 (1st Cir. 1977), cert. denied, 435 U.S. 922 (1978); United States v. Cryan, 490 F. Supp. 1214, 1241 (D.N.J.), aff'd, 636 F.2d 1211 (3d Cir. 1980); J. Weinstein & M. Berger, Weinstein's Evidence ¶ 104[05], at 104-44 (1982).

This Court has consistently denied certiorari in cases applying this interpretation of Rule 104. See notes 2 & 3 supra. There is no more reason to review this case than there was to review those previous cases, because evidence independent of Lonardo's out-of-court statements established that petitioner and Lonardo were co-conspirators. Greathouse's testimony established the existence of a scheme whereby Greathouse would obtain one kilogram of cocaine from his sources and Lonardo would sell the cocaine to buyer-distributors in Cleveland. On May 25, Greathouse spoke directly by telephone with a potential purchaser-distributor provided by Lonardo who promised an up-front payment of $15,000. That very evening the quarter-kilogram of cocaine was handed to and accepted by petitioner, who had been waiting in the Hilton parking lot and had more than $20,000 in cash in his car. Certainly these facts, which in no way depend on any out-of-court statements by Lonardo, establish that petitioner was a purchaser of Greathouse's cocaine.

These same facts, coupled with Lonardo's delivery of the cocaine from Greathouse to petitioner, independently establish the existence of a conspiracy to distribute cocaine. It is true that, because Greathouse was a government informant, no indictable conspiracy could have existed between Lonardo and Greathouse. See, e.g., United States v. DeBright, 742 F.2d 1196, 1199 (9th Cir. 1984). But a conspiracy between petitioner and Lonardo was shown.

Petitioner mischaracterizes his transaction with Lonardo by suggesting that it was nothing more than a purchase of cocaine, which is insufficient to establish conspiracy (Pet. 8, 13, 24-25). 4/ Instead, the evidence showed that Lonardo's "people"

4/ It is true that "neither the buyer nor the seller of narcotics can be guilty of conspiracy * * * merely by virtue of the relationship established by [a single] sale"; this is because, if "a crime is so defined that an agreement is required to commit it, the presumption is that that minimum agreement cannot also be punished as a conspiracy." United States v. Manzella, No. 85-2189 (7th Cir. May 20, 1986), slip op. 2-3. But a buyer-seller

(Continued)

(such as petitioner) were to sell the cocaine that they bought from Lonardo and Greathouse. As the court of appeals correctly observed (Pet. App. A7), a large volume of narcotics was involved. Both the amount and the price of the cocaine lead readily to an inference that it was intended for further distribution. See, e.g., United States v. Carrascal-Olivera, 755 F.2d 1446, 1451 (11th Cir. 1985); United States v. Del Aguila-Reyes, 722 F.2d 155, 157 n.4 (5th Cir. 1983).

As the court of appeals concluded (Pet. App. A6-A7), this evidence established the existence of a "chain" conspiracy -- a type common in the drug distribution business. The conspiracy necessarily involved Greathouse's sources, Greathouse himself acting the part of wholesaler, Lonardo as broker or middleman, and petitioner as retailer, but the involvement of Lonardo and petitioner by itself is sufficient to establish a conspiracy. See Carrascal-Olivera, 755 F.2d at 1450-1451. The common goal uniting the participants was the marketing of cocaine for profit in the Cleveland area. As the court of appeals explained (id. at A6), in a "chain" conspiracy "[o]ne can assume that participants understand that they are participating in a joint enterprise because success is dependent on the success of those from whom they buy and to whom they sell." See also, e.g., United States v. Warner, 690 F.2d 545, 549 (6th Cir. 1982); United States v. Martino, 664 F.2d 860, 876 (2d Cir. 1981), cert. denied, 458 U.S. 1110 (1982).

Thus, there is no merit to petitioner's claim that the court of appeals misapplied Fed. R. Evid. 801(d)(2)(E). 5/

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relationship between two individuals does not automatically preclude a finding that they are co-conspirators: "where there is additional evidence beyond the mere purchase or sale, from which knowledge of the conspiracy may be inferred, courts have upheld conspiracy convictions." United States v. Grunsfeld, 558 F.2d 1231, 1235 (6th Cir. 1977), cert. denied, 434 U.S. 872 (1978).

5/ Lonardo's statement on May 12 that he had talked to his "people" and they were interested gives rise to an inference that petitioner had begun to conspire with Lonardo no later than May (Continued)

b. Nor is there any merit to petitioner's contention that the admission of Lonardo's out-of-court statements violated the Confrontation Clause because they were unreliable. To be sure, this Court has held that when a hearsay declarant is not present for cross-examination at trial, his statement is admissible only if it bears adequate "indicia of reliability." See, e.g., Ohio v. Roberts, 448 U.S. 56, 65-66 (1980); Mancusi v. Stubbs, 408 U.S. 204, 213 (1972). The Court also has held, however, that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Ohio v. Roberts, 448 U.S. at 66. As the court of appeals concluded (Pet. App. A5), the co-conspirator rule qualifies as such a "firmly rooted" exception. Accord, United States v. Peacock, 654 F.2d 339, 349-350 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983). See also United States v. Molt, 758 F.2d 1198 (7th Cir. 1985) (evidence admitted under co-conspirator rule automatically satisfies Sixth Amendment); United States v. Lurz, 666 F.2d 69, 80-81 (4th Cir. 1981), cert. denied, 455 U.S. 1055 (1982) (same); Ottomano v. United States, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973) (same). After all, this Court adopted the co-conspirator rule more than a century and a half

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12. Ignoring that out-of-court statement, petitioner is no better off, even if the other evidence does not show petitioner's involvement in the conspiracy until May 25; a person who joins a conspiracy already in progress is responsible for the acts and statements of others in furtherance of the conspiracy before he joined it. See, e.g., United States v. Gravier, 706 F.2d 174, 177-178 (6th Cir.), cert. denied, 464 U.S. 996 (1983); United States v. Sarno, 456 F.2d 875, 878 (1st Cir. 1972). Assuming arguendo that this evidence did not even show the existence of a conspiracy before May 25, any error committed in admitting pre-May 25 statements was harmless. On May 25, petitioner spoke directly with Greathouse about the cocaine transaction; Lonardo had a later conversation with Greathouse in which he arranged the transaction; and Lonardo then delivered the large quantity of cocaine from Greathouse to petitioner. These events of May 25, by themselves, were sufficient to establish the existence of a conspiracy between petitioner and Lonardo to distribute cocaine, and other evidence showing the existence of the conspiracy was merely cumulative.

ago (see United States v. Gooding, 25 U.S. (12 Wheat.) 460, 469-470 (1827)), and since then has frequently reaffirmed, applied, and refined it. 6/

In recently reaffirming the validity of the co-conspirator rule in United States v. Inadi, No. 84-1580 (Mar. 10, 1986), the Court observed that the admission of co-conspirator declarations actually furthers the purpose of the Confrontation Clause to advance the truth-determining process. Slip op. 8. The Court explained that "it is extremely unlikely that in-court testimony will recapture the evidentiary significance of statements made when the conspiracy was operating in full force" and therefore that co-conspirator statements "are usually irreplaceable as substantive evidence" (ibid.). This discussion is in harmony with the recognition by courts of appeals that, as "contemporaneous statements in an ongoing business relation," co-conspirator declarations are reliable in the same sense, for example, that "contracts or negotiations among legitimate business partners usually portray accurately the affairs of those involved." United States v. Molt, 772 F.2d 166, 168-169 (7th Cir. 1985).

It is true that some courts of appeals have required a separate, individualized inquiry into whether co-conspirator statements are sufficiently reliable for Confrontation Clause purposes. See, e.g., United States v. Szabo, No. 85-1686 (10th Cir. May 12, 1986), slip op. 9-10; United States v. DeLuna, 763 F.2d 897, 909-910 (8th Cir. 1985); United States v. Ammar, 714 F.2d 238, 254-257 (3d Cir.), cert. denied, 464 U.S. 936 (1983); United States v. Perez, 658 F.2d 654, 660 & n.5 (9th Cir. 1981); United States v. Wright, 588 F.2d 31, 37-38 (2d Cir. 1978), cert.

6/ See, e.g., United States v. Nixon, 418 U.S. 683, 701 (1974); Anderson v. United States, 417 U.S. 211, 218 (1974); Dutton v. Evans, 400 U.S. 74, 81 (1970) (opinion of Stewart, J.); Wong Sun v. United States, 371 U.S. 471, 490 (1963); Lutwak v. United States, 344 U.S. 604, 617-618 (1953); Krulewitch v. United States, 336 U.S. 440, 442-443 (1949); Glasser v. United States, 315 U.S. 60, 74-75 (1942).

denied, 440 U.S. 917 (1979). The statements at issue here clearly pass this test as well.

Even those courts that do not regard co-conspirator statements as automatically reliable for Confrontation Clause purposes have indicated that, except in unusual circumstances, evidence that is properly admitted under the co-conspirator rule will not violate the Confrontation Clause. Szabo, slip op. 9 n.4; DeLuna, 763 F.2d at 910. They acknowledge that "'[i]n most cases the determination that a declaration is in furtherance of the conspiracy * * * will decide whether sufficient indicia of reliability were present. While there may be exceptions, we do not think that they will be frequent.'" Wright, 588 F.2d at 38 (quoting United States v. Puco, 476 F.2d 1099, 1107-1108 (2d Cir.), cert. denied, 414 U.S. 844 (1973)); accord, Ammar, 714 F.2d at 256; United States v. Nelson, 603 F.2d 42, 46 (8th Cir. 1979). In assessing reliability, these courts generally examine four factors derived from Dutton v. Evans, 400 U.S. 74, 88-89 (1970) (opinion of Stewart, J.). They are (Ammar, 714 F.2d at 256 (quoting Perez, 658 F.2d at 661)):

> (1) Whether the declaration contained assertions of past fact; (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; (3) whether it was possible that the declarant was relying upon faulty recollection; and (4) whether the circumstances under which the statements were made provided reason to believe that the declarant had misrepresented the defendant's involvement in the crime.

Lonardo's out-of-court statements in the instant case clearly were reliable under this analysis. In particular, the conversations alluding to petitioner, Lonardo's "gentleman friend," concerned ongoing and future transactions, specifically arrangements for the cocaine transaction. (Insofar as the statements concerned Lonardo's past relationship with Greathouse, Lonardo had no motive to lie and obviously could not have done so successfully, since Greathouse necessarily was as familiar with the relationship as was Lonardo.) Lonardo as declarant clearly had knowledge of petitioner's identity and role in the activities --

indeed, he arranged for petitioner to have that role. There is no possibility that Lonardo was relying on faulty recollection; he was simply describing the current arrangement for the exchange. And there is no reason to believe that Lonardo misrepresented petitioner's involvement in the crime: Lonardo had no motive to lie about the existence of "people" or a "gentleman friend" who would purchase Greathouse's cocaine, for if such people did not exist Lonardo would have had nothing to gain by claiming that they did. Moreover, the existence of the "gentleman friend," and the identification of petitioner as that friend, were strongly corroborated by the evidence that petitioner did in fact purchase Greathouse's cocaine through Lonardo.

Indeed, petitioner makes no attempt to address any of these four factors or any other reason why the statements could be said to be unreliable. In short, no federal court of appeals would have excluded Lonardo's statements under the Confrontation Clause. 7/

2. Petitioner also contends that the evidence was insufficient to support his convictions for conspiring to distribute cocaine (Pet. 21-28) and for possessing cocaine with intent to distribute it (Pet. 28-29). As previously discussed, the evidence independent of Lonardo's hearsay statements to Greathouse by itself established the existence of a "chain conspiracy" to market cocaine for profit in Cleveland, with at least Lonardo and petitioner participating, petitioner playing the role of retailer

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7/ Relying on Dutton v. Evans, 400 U.S. 74, 87 (1970) (opinion of Stewart, J.), petitioner argues (Pet. 22) that the admission of Lonardo's statements was unconstitutional because the statements were "crucial" to the prosecution and "devastating" to the defense. We strongly disagree that Lonardo's statements were in any way crucial to the prosecution. To the contrary, the actions of Lonardo and petitioner on May 25, without the out-of-court statements by Lonardo, would have provided an ample basis for the jury to convict (see note 5 supra). And even if petitioner were correct that these statements were "crucial," that would be of no moment. Nothing in Dutton suggests that reliable co-conspirator statements become inadmissible under the Confrontation Clause just because they are particularly probative of guilt. Inadi suggests the contrary.

of the cocaine. The additional evidence of Lonardo's conversations with Greathouse corroborated Greathouse's testimony that he was to supply the cocaine and that Lonardo was to line up buyer-distributors and to obtain partial payment from them.

Likewise, the evidence was sufficient to support petitioner's conviction for possessing cocaine with intent to distribute it. An FBI agent testified that he saw Lonardo give petitioner a large quantity of cocaine and that petitioner accepted it. When the agents arrested petitioner immediately thereafter, they found the cocaine in his car. Petitioner suggests, however (Pet. 28-29), that the evidence fell short of establishing that he knew the bags that Lonardo gave him contained cocaine. In light of the clandestine manner in which the transaction was carried out, the $21,000 in cash found in petitioner's car, and the telephone call Greathouse had with Lonardo's "gentleman friend," the jury was clearly entitled to conclude that petitioner knew that the substance he received from Lonardo was cocaine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

JUNE 1986

NO. 85-6725

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM JOHN BOURJAILY,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITIONER'S REPLY BRIEF

JAMES R. WILLIS, ESQ.
Attorney for Petitioner
Suite 610, Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
(216) 523-1100

CHARLES FRIED,
Solicitor General

STEPHEN S. TROTT,
Assistant Attorney General

JOEL M. GERSHOWITZ,
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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PETITIONER'S REPLY BRIEF

The suggestion implicit in the Government's Brief, that the cocaine Greathouse (the informant) transferred to Lonardo (his partner) was "to be sold by people Lonardo was to solicit" (Government's Brief, 1-2), is no less a naked and indefensible supposition now than it was when originally articulated. Indeed, the incontrovertible facts show Lonardo fully intended to only sell the cocaine here involved, for the benefit of himself and Greathouse, to anyone willing to pay their price. Simply put, the Government's inferential notions to the contrary notwithstanding, the "people" Lonardo referred to as "his 'people'" (id., 6-7, n. 5) could only have been the different individuals Lonardo contacted as potential buyers of one or more of the various parcels that were being offered by Lonardo and Greathouse for sale at prices fixed for them.

Now admittedly the Government has to argue, as it does by clever implications and wild assertions, that these "people" would be furthering some interest of Lonardo other than paying him the price involved in their respective purchases. Obviously then, the argument was made in order to create a basis for the Government's farfetched assertion that all of those contacted by Lonardo automatically became involved in some sort of joint effort. Still there was nothing in the evidence that shows this to be the case.

On the other hand, it makes absolutely no sense for the Government to argue, as it apparently does, that if "A" (Lonardo) makes, or even attempts to make, a sale of drugs to "B" (assertedly our petitioner) for a fixed sum of money, this would put "A" in a conspiratorial relationship with "B" in connection with anything "B" may have possibly contemplated doing with the drugs after actually acquiring them. Even this is not all. Any propositions or discussions "B" may have had with "A" would also put "B" in a conspiratorial relationship with anyone else "A" might have sought to sell, or even discussed selling, drugs to from his supply.

Obviously the reason all this would be unfathomable could not be clearer. Simply put, at best any dealings between "A" and "B", absent proof of an ongoing relationship, could only be regarded as an isolatable sale, or attempted sale, that was unrelated to any other aspects of "A's" drug dealings with others. This follows here all the moreso because even the Government has conceded these sales were subject to a test being made of the quality product involved. (Id., at 2.) (Also see R 168.)

Another completely arbitrary statement in the Government's Brief reads as follows: "On May 25, Petitioner spoke directly with Greathouse about the cocaine transaction" (id., 6-7, n. 5).

(Emphasis supplied.) Typically, the Government has assumed something must be so because they say so. Obviously the reason the Government has relied so heavily on this penchant for exaggeration is really not surprising.

On the other hand, not even the Government can get away from the total lack of any proof whatsoever that our petitioner ever talked to Greathouse, as the Government contends, in hopes of making a point it really needs. Moreover, it cannot be overlooked that it is just as likely that whoever it was that talked to Greathouse about the quality and the price of the cocaine (Greathouse and Lonardo were trying to sell) was simply one of the anonymous people Lonardo had referred to as "some people" (id., 2) or "Lonardo's people" (id., 5), as the Government would put it, that he would be contacting. His purpose in doing this was to make the effort to sell them his product.

In any event Lonardo, as the Government concedes, only told Greathouse on May 17 "he would get in touch with 'some people' and contact Greathouse" again (ibid). And, again on May 24 Lonardo is credited with telling Greathouse "he would try to contact some people" (ibid). Obviously this was to see if any of these people were interested in buying any of what Lonardo thought was their cocaine. This can hardly mean that those actually contacted would perforce be partners (with each other and with Lonardo) even if they did or did not purchase from Lonardo as a common source. And, just as surely it does not follow that because our petitioner was seen in the parking lot he had to have been the person Greathouse talked to in the conversation referred to above.

The conclusion that this unknown person had to have been our petitioner is simply too unreasonable to be relied on as a fact. To the extent then this conclusion, if valid, would provide support for the Government's overall thesis, it's invalidity should have the exact opposite effect.

(3)

Another point made in the Government's Brief merits at least a passing reference. This, of course, is the contention made that the egregious hearsay evidence was properly admitted under 801 (d) (2) (E) and that no confrontation rights were offended. On this we contend the arguments made in our Petition should carry the day for the petitioner. For it simply has to be that the Government's analysis of the central thrust of our position cannot survive meaningful scrutiny. Also, the argument that the conduct of our petitioner in the parking lot, which at most can only be said to be suspicious, hardly satisfies the possession and knowledge aspects of the offense charged.

For all of these reasons, including the lack of substance in the Government's arguments, this cause should be reviewed.

Respectfully submitted,

JAMES R. WILLIS, ESQ.
Attorney for Petitioner
Suite 610, Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
(216) 523-1100

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was mailed to the offices of Charles Fried, Solicitor General; Stephen S. Trott, Assistant Attorney General; and Joel M. Gershowitz, Attorney, at The Department Of Justice, Washington, D.C. 20530, this 10th day of July, 1986.

James R. Willis

JAMES R. WILLIS, ESQ.
Attorney for Petitioner

No. 85-6725

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WILLIAM J. BOURJAILY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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JOINT APPENDIX

JAMES R. WILLIS
Suite 610, Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
(216) 523-1100
Counsel for Petitioner

CHARLES FRIED
Solicitor General
Department of Justice
Washington D.C. 20530
Counsel for Respondent

PETITION FOR CERTIORARI FILED APRIL 15, 1986
CERTIORARI GRANTED OCTOBER 14, 1986

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CR 84-105

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ANGELO J. LONARDO
and
WILLIAM BOURJAILY, DEFENDANTS

Title 21, Section 841(a)(1)
Title 21, Section 843(b)
Title 21, Section 846
United States Code

INDICTMENT

COUNT I

The Grand Jury charges:

From at least May 12, 1984, and continuing up to and including May 25, 1984, the exact dates to the Grand Jury unknown, in the Northern District of Ohio, Eastern Division, and elsewhere, ANGELO J. LONARDO, and WILLIAM BOURJAILY, the defendants herein, did unlawfully, willfully, intentionally, and knowingly combine, conspire, confederate, and agree together and with each other and agree with diverse others to the Grand Jury known and unknown, to distribute cocaine, and to possess cocaine with the intent to distribute said substance, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

OVERT ACTS

In furtherance of the conspiracy and to effect the objectives thereof, the defendants performed the following overt acts:

1. On or about May 12, 1984, ANGELO J. LONARDO met with Clarence Greathouse at Denny's Restaurant, Parma, Ohio and discussed the purchase of a kilogram of cocaine.

2. On or about May 17, 1984, ANGELO J. LONARDO had a telephone conversation from Cleveland's P.M. Restaurant, Valley View, Ohio with Clarence Greathouse regarding a partial downpayment for the purchase of a kilogram of cocaine.

3. On or about May 19, 1984, ANGELO J. LONARDO met with Clarence Greathouse at Cleveland's P.M. Restaurant, Valley View, Ohio, and paid Clarence Greathouse $1,000 as a partial downpayment for the purchase of a kilogram of cocaine.

4. On or about May 21, 1984, ANGELO J. LONARDO had a telephone conversation with Clarence Greathouse at the Marriott Inn, Cleveland, Ohio regarding the delivery of a kilogram of cocaine.

5. On or about May 24, 1984, ANGELO J. LONARDO met with Clarence Greathouse at the Sheraton Hopkins Airport Hotel, Cleveland, Ohio, and discussed the purchase of a kilogram of cocaine.

6. On or about May 25, 1984, ANGELO J. LONARDO had a telephone conversation with Clarence Greathouse at the Sheraton Hopkins Airport Hotel, Cleveland, Ohio and discussed the payment and delivery of a kilogram of cocaine.

7. On or about May 25, 1984, ANGELO J. LONARDO and WILLIAM BOURJAILY met Clarence Greathouse at the Hilton Inn, Independence, Ohio and took delivery of a kilogram of cocaine.

All in violation of Title 21, United States Code, Section 846.

COUNT II

The Grand Jury further charges:

On or about May 25, 1984, in the Northern District of Ohio, Eastern Division, ANGELO J. LONARDO and WILLIAM BOURJAILY did knowingly and intentionally possess with intent to distribute approximately one kilogram of cocaine, a Schedule II narcotic drug controlled substance; in violation of Title 21, Section 841(a)(1), United States Code, and Title 18, United States Code, section 2.

COUNT III

The Grand Jury further charges:

On or about May 17, 1984, in the Northern District of Ohio, Eastern Division, ANGELO J. LONARDO did knowingly and intentionally use a communication facility, to wit: a telephone to facilitate acts constituting a felony under Section 846 and 841(a)(1) of Title 21, United States Code; in violation of Title 21, Section 843(b), United States Code.

COUNT IV

The Grand Jury further charges:

On or about May 25, 1984, in the Northern District of Ohio, Eastern Division, ANGELO J. LONARDO did knowingly and intentionally use a communication facility, to wit: a telephone to facilitate acts constituting a felony under Section 846 and 841(a)(1) of Title 21, United States Code; in violation of Title 21, Section 843(b), United States Code.

A TRUE BILL

_____

Foreman

_____

PATRICK M. MCLAUGHLIN
Acting United States Attorney

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

(Title Omitted in Printing)

SELECTED SEGMENTS OF TRANSCRIPT OF PROCEEDINGS

DIRECT EXAMINATION OF
CLARENCE GREATHOUSE

* * * *

[5] Q. When did you first meet Angelo J. Lonardo?

A. The latter part of '80, 1980 or the early part of '81.

Q. This person that you met, Angelo J. Lonardo, do you see him in the courtroom today?

A. Yes. He's sitting across the room from me in a greyish-like jacket with a striped tie (indicating).

MR. BAKEMAN: Your Honor, may the record reflect the witness has identified the defendant Angelo J. Lonardo?

THE COURT: It may.

BY MR. BAKEMAN:

Q. Where did this meeting take place?

A. Howard Johnson's at 55th and Marginal.

Q. Okay. Clarence, could you put your hand down, please?

A. Oh, okay.

Q. When did you first meet Special Agent Hardrick Crawford of the FBI?

A. About the middle of 1982.

Q. And could you describe for the jury your relationship with Hardrick Crawford?

A. Yes. I worked with him for quite awhile. We worked in narcotics, well, you might say busting people, [6] setting up narcotics dealers.

Q. While you were engaged, would it be a fair phrase to say that you were an informant?

A. Yes, I was an informant.

Q. While you were an informant with the FBI, were you still engaged in the sale of illegal drugs?

A. Yes, I was.

Q. Was the FBI aware of your activities?

A. No, they were not.

MR. WILLIS: Objection.

THE COURT: Sustained.

MR. WILLIS: I move that answer be stricken.

THE COURT: The answer may be stricken and the question.

BY MR. BAKEMAN:

Q. Did you ever inform the FBI of your activities in the illegal sale of drugs?

A. No, I did not.

Q. As a result of your cooperation with Crawford and other FBI agents, did you ever receive any benefits?

A. I received $2800 throughout the period of my involvement with them, 2500 for Rico Petronsio, for odds and ends that I had incurred, expenses.

Q. And the $300?

[7] A. $300 for another—

Q. Was that for a fugitive?

A. A fugitive.

Q. Okay. In March of 1983, were you arrested by State authorities on an indictment for drug trafficking?

A. Yes, I was.

Q. What happened to that charge?

A. The case was dismissed because of lack of evidence. The witness didn't appear. That's what my attorney told me.

MR. WILLIS: Objection. Move that answer be stricken and the jury instructed.

THE COURT: Sustained. Sustained as to what his attorney told him.

* * * *

[8] A. You mean did they confiscate anything?

Q. Right.

A. Yes. They took four kilos of cocaine, 81,000 in cash, gold, jewelry, coin collections, took everything I had.

Q. As a result of that seizure on December 10th, did you ever subsequently plead guilty to charges relating to the December 7th or—excuse me—December 10th search?

A. I don't understand.

Q. I'll withdraw the question.

In May of 1984, did you reach an agreement with the Federal Government?

A. Yes, I did.

Q. Would you please outline for the jury the agreement that you reached?

MR. WILLIS: Objection.

THE COURT: Overruled.

A. I went to the Federal Government with a—to talk to them about maybe working with them steady, about getting my sentence reduced, and I pleaded guilty to a continuous criminal enterprise which carries a sentence of ten years, to the best of my knowlede, and—

Q. Ten years to what?

A. Ten years to life.

* * * *

[21] DIRECT EXAMINATION OF
CLARENCE GREATHOUSE (Resumed)

(Tape resumed.)

BY MR. BAKEMAN:

Q. Earlier in the transcript, Mr. Greathouse, you heard Mr. Lonardo say "The way we'll do it is the way we did with the one fellow," and you said "Okay."

MR. DeVAN: Objection.

THE COURT: Let me hear the question.

BY MR. BAKEMAN:

Q. And then you responded "Okay."

Do you recall that dialogue?

A. Yes, I do.

Q. When you responded "Okay—"

MR. DeVAN: I'll object again to this entire line of questioning, your Honor.

THE COURT: Let's approach the side bar.

(Thereupon, the following proceedings were had at the side bar out of the hearing of the jury:)

MR. DeVAN: Your Honor, the purpose of my [22] objection is the same reason as before. We are talking about apparently this conversation with Miller and previous deals, and I don't believe this is in furtherance of the conspiracy.

Plus it is an uncharged act and to reemphasize this by asking him specific questions truly goes beyond the use of this tape for whatever purpose the Government has offered it.

And I don't feel it's beneficial or probative of the issue here, whether or not my client conspired in this case.

THE COURT: Yes, Mr. Willis.

MR. WILLIS: Yes. I don't see how it's even possible that these conversations could ever be a part of a conspiracy yet to be formed, assuming one was eventually formed, in which Mr. Bourjaily and Lonardo were members.

And he's being grievously harmed by this type of testimony which shows, if it does, some relationships

between Mr. Lonardo and Mr. Greathouse in which he is not privy to, should not be affected by in any way.

So I feel, your Honor, that we ought to be severed out of this case at this point because it can only get worse given the fact that the indictment charges a conspiracy in which Mr. Bourjaily could have only possibly [23] entered on the day that the alleged sale took place.

MR. BAKEMAN: Your Honor, responding first to Mr. Willis's argument, even assuming the posture that Mr. Willis takes here in that he entered the conspiracy on the 25th, that is still sufficient evidence to constitute participation in the conspiracy as charged.

Your Honor, the Government has stayed away from the conversation regarding Anselmo and the money owed and the debt ostensibly because the only conversation that the Government has called Mr. Greathouse's attention to is the conversation where Mr. Lonardo himself said "We will do it the way we did it before."

And that conversation I believe is material based on the opening statement that Mr. DeVan said where Mr. Lonardo's intent at these meetings becomes in issue.

Further, again like I said before it was voluntarily stated by Mr. Lonardo and no proferring or insistence by Clarence Greathouse.

MR. McHARGH: Your Honor, further, the statement is obvious in its indication as to how they were going to proceed with this present deal, and Lonardo's instructing as to how the proceeding is going to go forward so that it is in furtherance of the conspiracy charged in the indictment.

* * * *

[24] MR. WILLIS: I might add, your Honor, that the conspiracy that Mr. Greathouse is talking about supposedly with Mr. Lonardo is a conspiracy between those two parties, and insofar as Mr. Bourjaily is concerned this reference is to some past conspiracy.

And even if it would be otherwise admissible for the purpose suggested by counsel, I think under Rule 403, the probative value insofar as the charges against Mr. Bourjaily is surely outweighed by the prejudicial impact of that evidence.

THE COURT: Motion is overruled.

(End of bench conference.)

BY MR. BAKEMAN:

Q. Mr. Greathouse, do you recall a conversation in this transcript where Mr. Lonardo said "And the way we'll do it is the way we did it with the one fellow," and you [25] responded "Okay"?

A. Yes, I do.

Q. When you responded "okay," did you know what Mr. Lonardo was talking about?

A. Yes, I did know.

Q. Would you please briefly describe for the jury how that deal went down?

MR. WILLIS: Objection.

MR. DeVAN: Objection.

THE COURT: Overruled.

MR. BAKEMAN: I'll withdraw that question for a moment.

BY MR. BAKEMAN:

Q. Why did Lonardo tell you "We'll do it the way we did it with the one fellow"?

MR. WILLIS: Objection.

MR. DeVAN: Objection.

THE COURT: Sustained.

BY MR. BAKEMAN:

Q. How do you understand that that deal took place?

A. Mr. Lonardo and I at one time before that had delivered a kilo of cocaine to an office building in Rocky River somewhere. I don't know the exact address.

At that time he and I and another associate of his, we delivered it to an office in that building. We went in [26] and sat down, and his other associate then picked up the kilo of cocaine and delivered it across the hall to another office to be tested and okayed for purchase.

* * * *

(Thereupon, the following proceedings were had at the side bar out of the hearing of the jury:)

MR. DeVAN: [Counsel for Co-defendant, Lonardo] Your Honor, the reason for my objection is it's quite clear now that this man is unable to pinpoint the time which makes it relevant to the conspiracy charged in the present case.

And conceivably this particular delivery, the Rocky River delivery, could have occurred 10 or 20 years ago [27] conceivably, and certainly is not during the continuing course of conduct which would have lead up to this particular conspiracy.

Likewise consipracies can be separate crimes at separate times. And if there was a separate conspiracy a long time ago that has no bearing upon this conspiracy, it should not be admitted.

At the very least he has failed to be specific as to the time of this particular crime and put us in a position where it's virtually impossible to defend against it. And I move that at this time the Court declare a mistrial and strike the jury panel and that we start over again.

MR. BAKEMAN: Your Honor, not to be repetitive, but the question is being asked as part of this conspiracy because it's relevant to the mode of delivery which is part of this conspiracy.

I will clear it up as far as within the parameters that he can as to when this indictment occurred.

THE COURT: It's overruled.

(End of bench conference.)

BY MR. BAKEMAN:

Q. Regarding the Rocky River incident, can you tell us whether or not that occurred within the last year, last two years?

[28] A. It was pretty much within the last year, I'm quite sure.

Q. Also previously in the transcript there is a conversation where you and Lonardo are using figures like 13 "O", 58.

Can you explain to the jury what is meant by the figure 58?

A. 58 represents in street language and our language $58,000.

* * * *

Q. Now, what was your understanding of what you were to do as far as your role in providing the cocaine?

A. I was to go and purchase the cocaine and call some shippers that I knew and have them deliver the cocaine to the City of Cleveland.

In return I was to purchase the cocaine here and ship to Mr. Lonardo's and my buyers.

[29] Q. Now, what was the cost of cocaine that you were paying for for one kilogram?

A. 21,000 to 25,000.

Q. Did you and Lonardo agree as to a price that you were going to sell it to other persons?

A. Yes, we did.

Q. What was the price?

A. 31,000.

Q. Now, what was your understanding as to the role that Lonardo was to play in the delivery of cocaine?

MR. DEVAN. Objection.

A. Mr. Lonardo was to line up his buyers.

MR. DEVAN: Objection.

THE COURT: Just a minute, please.

* * * * *

[30] MR. WILLIS: My concern is somewhat different.

It appears that this Miller testimony was admitted, if

I understood counsel, for some limited purpose of showing that there would be a similarity as between the delivery in the other case, the Miller situation, and the delivery of cocaine in this instance.

If that's the limited purpose, then it's obviously not substantive proof of any of these charges, and the jury ought to be so instructed.

On the other hand, I have very real grave concerns [31] now given the thrust of this evidence, it appears that that was a conspiracy between Mr. Lonardo and Mr. Greathouse, and we all know that one act does not make—an act involving a seller and purchaser does not make the seller and purchaser conspirators.

So it seems if that's the thrust of the evidence as it's coming across now, there can never be a conspiracy between Mr. Lonardo if he is passing himself off as a seller, assuming Mr. Bourjaily is a purchaser. There is no conspiracy between purchaser and seller.

And I think the evidence is clear—I mean the law is clear on that point.

So again, your Honor, I'm alerting the Court that we have been grievously harmed by this evidence that's coming in in this very convaluted fashion and it cannot be corrected by any instructions that could possibly be conceived by the Court, even with the assistance of counsel obviously.

* * * *

[33] BY MR. BAKEMAN:

Q. Mr. Greathouse, referring to the May 12th meeting at Denny's Restaurants, what was your understanding as to what Lonardo was supposed to do?

A. Mr. Lonardo was supposed to go out and call his people. What I mean by his people is his buyers of cocaine, people that I had never had the chance or opportunity to meet.

He was supposed to line them up for the cocaine that I had on order to be received.

MR. BAKEMAN: If you would put the headsets back on, please.

(Pause.)

(Tape resumed.)

* * * *

[75] BY MR. BAKEMAN:

Q. Earlier in the transcript you said "I'm on a clear phone."

Will you describe to the jury what you meant by a clear phone?

A. Yes. I meant I was on a pay phone in the lobby somewhere, possibly, and we knew that—

MR. WILLIS: Objection.

THE COURT: Sustained as to "We knew."

BY MR. BAKEMAN:

Q. What do you know, did you know?

A. Okay. I knew, I knew that pay phones were not tapped. We need them for caution of safety, I did.

Q. Would you say the use of a telephone by persons familiar with the illegal trafficking in drugs—

MR. WILLIS: Objection.

MR. DEVAN: Objection, your Honor.

THE COURT: Let me hear the question. Let me hear the question.

BY MR. BAKEMAN:

Q. Mr. Greathouse, would you say it was a common practice by persons who are trafficking in illegal drugs to use pay phones or other sorts of public telephones?

MR. DEVAN: Objection.

THE COURT: He may answer. Overruled.

[76] A. Yes, it's definitely common practice. You never use your home phone.

Q. Did Lonardo come to meet you on the evening of May 24, 1984?

A. Yes.

Q. And where did he meet you?

A. We met in the lounge of the Sheraton.

Q. And the Sheraton at what location?

A. Airport Sheraton.

Q. Do you recall approximately what time it was that he got there?

A. 9:30, 10:00 o'clock, something like that.

Q. Where did you meet Lonardo?

A. I met him in the lobby and we went to the lounge.

Q. How long did you stay in the lounge?

A. Approximately 20, 30 minutes.

Q. Was there any conversation between yourself and Lonardo in the lounge regarding trafficking in cocaine?

A. Yes.

Q. Were you wearing a body recorder of any type at that time?

A. No.

Q. What did you do while in the lounge?

A. Well, we sit there, we talked about the cocaine, and I told him that I had received—

* * * *

[80] BY MR. BAKEMAN:

Q. What did you say in the note?

A. I put in the note that a quarter kilo of cocaine was 12,500 per quarter kilo.

Q. By the way, on a prior date had you and Mr. Lonardo agreed as to the price of a kilogram of cocaine?

A. Yes, we had.

Q. What was that price to be?

A. 31,000 a kilo.

Q. Did you have any conversation with Lonardo on the 24th about the receipt of that note?

A. Yes, I did.

Q. What was the nature of that conversation to the best of your recollection?

A. The conversation—

MR. WILLIS: Objection, your Honor. May we approach the bench?

THE COURT: Overruled. Overruled.

A. The conversation was that when he read the note, he misunderstood the note.

MR. WILLIS: Objection.

THE COURT: I'll overrule it. He's telling what the conversation is.

MR. WILLIS: He's saying somebody misunderstood something, your Honor.

[81] THE COURT: I assume he's talking about Mr. Lonardo.

THE WITNESS: Yes. Mr. Lonardo.

Rephrase that.

BY MR. BAKEMAN:

Q. Did you have a conversation with Lonardo about the receipt of that note the evening of May 24th?

A. Yes. Yes. He, Mr. Lonardo, told me that he misunderstood the note. There's four quarter kilos in a kilo of cocaine.

Now, the way that I had specified it in the note that I wanted 12,500 per quarter kilo, the way Mr. Lonardo explained it to me was he understood the note to say that I wanted 50,000 a kilo, four times 12,500 and I had already quoted him 31,000.

So he misunderstood and he told his people that I was supposedly, that I was asking 50,000 instead of 31,000 so he had to come and talk to me about the price.

Q. Now, this meeting that took place on the 24th, have you had an opportunity to review the video tape and the transcript?

A. Yes, I have.

* * * *

[85] Q. This first phone conversation on the 25th, that was taped, is that not correct?

A. Yes, it was.

Q. Did any party give consent to the taping of the phone conversation?

A. I did.

Q. Do you recall that conversation?

A. I think I asked him if he wanted to get together for a cup of coffee.

Q. Did Lonardo say whether or not he had anybody present with him?

MR. WILLIS: Your Honor, may we approach the bench?

(Side bar conference had off the record.)

BY MR. BAKEMAN:

Q. Do you recall whether or not Mr. Lonardo indicated whether or not anybody was with him?

A. Yes. He said he had a friend with him.

Q. What occurred next in that phone conversation if you recall?

A. Mr. Lonardo and I, we talked for a few minutes and I asked him who was going to stand good for the [86] merchandise.

Q. Okay. Showing you what's been marked for identification purposes as Government's Exhibits 12-A and 12-B, can you identify them?

A. Yes. These are the tapes of the conversation.

Q. That was a phone conversation; is that correct?

A. Yes.

Q. And 12-B is what?

A. Is the transcript of the conversation.

Q. Have you had an opportunity to review the tape and transcript?

A. Yes, I have.

Q. Are the tapes and transcripts fair and accurate to the best of your recollection?

A. Yes, they are.

(Pause.)

MR. BAKEMAN: Your Honor, for the record we will be playing Side A of Government's Exhibit 12-A.

(Tape played.)

BY MR. BAKEMAN:

Q. After you hung up the phone with this phone conversation with Lonardo on May 25th, what next did you do?

A. At that time we didn't have a chance to hook up a recorder, and I went down.

[87] MR. WILLIS: Objection.

THE COURT: Overruled.

BY MR. BAKEMAN:

Q. Just what did you do?

A. I hung up the phone and went to the lobby to call him.

Q. Was this second phone call recorded?

A. No, it wasn't.

Q. Now, earlier the phone call that was recorded, Lonardo talked about trees again. Do you recall him saying "trees"?

A. Yes.

Q. Did you know what Lonardo was talking about when he said "trees"?

A. Yes, I did.

Q. And what was that?

A. He was talking about cocaine. You never use "cocaine" on the telephone.

Q. Now, when you went down to the lobby, did you again engage in a phone conversation with Lonardo?

A. Yes, I did.

Q. Can you tell the jury to the best of your recollection what Lonardo said and what your response was to his questions?

A. Mr. Lonardo and I was talking—I was talking to [88] him about who was going to stand good for the cocaine, how was it going to be paid for.

And then at that time he says "I have a friend with me. Would you care to talk to him?" I said "Yes," so I talked to the unknown man. I have no knowledge who he was.

Q. Okay. Do you recall the conversation that you had with this second individual?

A. Yes.

MR. WILLIS: Objection.

THE COURT: Let's approach the side bar, please.

(Thereupon, the following proceedings were had at the side bar out of the hearing of the jury:)

THE COURT: Yes, Mr. Willis.

MR. WILLIS: Yes. It appears now that we are going to be limited in our ability to deal with this response by Mr. Greathouse's imagination. For reasons known only to Mr. Greathouse he declined to have this phone conversation recorded because if he was going to make a call to Mr. Lonardo there is no way in the world Lonardo could possibly know that he was not calling from the very same phone he had previously called from.

And so this trip to the lobby insofar as I'm concerned protrays Mr. Greathouse as being a—as being [89] one who can certainly be creative in his thinking, and I think is highly prejudicial to Mr. Bourjaily because again he has no check on what he is saying and is going to say.

I think we ought to voir dire this examination outside the presence of the jury and have the Court deal with it on that basis because his motivations for going to another phone require an explanation.

• • • •

[93] THE COURT: You may keep your seats while you talk if you want to.

Yes, Mr. Willis.

MR. WILLIS: If it's all right with the Court, I'd like to use the podium.

First of all, your Honor, you have to accept as being probative, because the Court admitted it, 11-B and all of its contents.

The segment that I read reads, at least on page four, what I gather from it is that Mr. Lonardo supposedly has to recontact some people. Quoting the statement, "See, I got to recontact these people."

So that tells me and the jury, and I think I'm reasonable in my assessment, that the upshot of what the previous conversation or the conversation that took place on May 24th was that Mr. Lonardo was supposed to contact some people, not one person, but some people.

Now, we have a situation where Mr. Greathouse calls from the hotel at 5:36 or whatever time it is, and he talks to Mr. Lonardo according to the transcript and he says "I've got a gentleman friend of mine right here now."

And then they say that the suggestion is made that he should use another telephone. And that suggestion, of course, is made by Mr. Greathouse who said "No, I'm not on [94] a pay phone. You want me to go to a pay phone and call you?" And the answer was "Absolutely."

Now, we don't have any reason to believe that he could not have simply redialed from the hotel, right where he was and said "I'm on the pay phone." How can a person who is at the other end of the phone, the other conversant, know whether you are calling him from a pay phone or from a phone in the hotel room?

So he has to have had ulterior motives for making a phone call that he knew would not be monitored by his partners, the FBI.

So that I have real concerns about the admissibility of this evidence. Number one, we don't know who he is talking to. That's by his own admission, "I don't know who I am talking to."

We know from the history of this conversation that Mr. Lonardo supposedly is going to recontact some people. We know from the recorded portion of the previous con-

versation on the same day Mr. Lonardo is quoted as having said "As a matter of fact, I have a gentleman friend of mine here now."

So that the impossible impact of this testimony if allowed by Mr. Greathouse, who has been preempted by his imagination as to what he will say, the jury will infer and the Government will try to assist them in inferring [95] that the person being talked to by Mr. Greathouse is Mr. Bourjaily.

And I think that's an unfair inference. I think that the prejudicial impact of that testimony will be absolutely devastating insofar as Mr. Bourjaily is concerned. Number one, he doesn't know who he is talking to. Number two, this is a statement he elected not to have recorded. And number three, the jury can infer, improperly so, that the other conversant was Mr. Bourjaily.

To the extent the Court deems it admissible, and I don't know what theory under Rule 801 that this evidence could possibly be admissible assuming that the statement is made by some other party, certainly I don't know what theory that it's being admitted under. I think they ought to be required to cite a rule as the basis for the admission of his testimony because the admission of all evidence in criminal trials in America, in Federal Courts, the basis for it has to be in those rules.

So that assuming that they can divine some rule, and I don't think they can, we would request under Rule 403 that it ought to be excluded because the prejudicial impact severely outweighs its probative value.

And we also have to understand that the Court has in abeyance the request that we made under Rule 104—no, [96] the Court has abeyance based on its—the Vinson and Enright decisions and the question is whether or not the conspiracy exists. So that we have some serious problems as to whether or not this evidence, assuming the Court let's it in, can be properly used by the Court in deciding the question under Rule 104 as to whether or not a conspiracy exists.

And I'm troubled by it, your Honor, and I think it's very unfair to the defendant and I move that the testimony ought to be excluded in the trial insofar as Mr. Bourjaily is concerned.

THE COURT: Mr. DeVan.

MR. DeVAN: Your Honor, I'll merely join in comments of Mr. Willis. It's really his motion.

I have a deep concern over certain statements by this unidentified male. They may come within nonconspiratorial hearsay declarations, and I think that a voir dire of this witness would be the proper way to determine whether or not this evidence should go in front of the jury.

MR. WILLIS: Your Honor, the rule I referred to is 801(d)(2)—whatever—that statements in furtherance of a conspiracy, 801(d)(2)(A), I think that's the rule, and that's the only rule in which they can get it in against Mr. Bourjaily. And but then it has to be a [97] statement in furtherance of a conspiracy of which he was a member.

That is the rule to which I have reference and I don't think they can torture this testimony in to fit within the ambit of that rule. And for that reason I feel it's inadmissible against Mr. Bourjaily.

THE COURT: Mr. Bakeman.

MR. BAKEMAN: Since my esteemed colleague decided to use the podium, to try to follow in his footsteps I'll do the same thing.

First of all, Your Honor, going back approximately two months ago the Government, pursuant to this Court's order, turned over to defense counsel a 302. The 302 was—the date of transcription was 5/30/84, and it dealt with this particular telephone call.

Mr. Willis's first complaint is that it goes to the reliability of this phone call as to why Greathouse could not have manipulated this conversation because the FBI was not in a position to monitor that. If he read the 302 very carefully, and I'm sure he did, he would have

realized that there was an FBI agent adjacent with him at the phone booth listening to everything Clarence Greathouse said. The FBI agent's name is Special Agent Richard Dorton.

So as far as the conversation that Greathouse had, [98] that was monitored to the best of the FBI's ability by having an agent present at all times with Clarence Greathouse.

If Clarence Greathouse is asked the question "Why didn't you dial back; how would Lonardo know that you were not at a pay phone," Greathouse would answer that question that pay phones in this area, the fourth number in a pay phone is the number 9. And so if he gave a 363-3980 number, Lonardo would know that was not a pay phone. But if he gave a 3639, dah, dah, dah, then Lonardo would know that that was a pay phone.

Now, whether or not that is a fact verified by the telephone company, that is a fact that the people involved in drug dealing were familiar with. And that's why he could not stay at that phone. He had to go down to a public phone in case Lonardo said "What phone number are you at; give it to me because I'll dial it, you hang up and I'll dial you back."

So I think that that is the reason why the scenario of events had to occur the way they did because of Lonardo's insistence.

THE COURT: I think I have already said at the side bar, you asked the question, there was an objection, I overruled the objection and you didn't proceed any further.

* * * *

[103] BY MR. BAKEMAN:

Q. Okay. Now, when you were talking on the phone this second time from the lobby, the first time in the lobby, who were you talking with the first time?

A. Angelo Lonardo.

Q. Okay. Do you recall the initial conversation between yourself and Lonardo?

A. Well, we—we started the conversation, we were discussing any—how the product was going to be paid for. That was our initial talk.

Q. Did you subsequently then talk to another individual on the phone?

A. Yes, I did.

Q. Did that person identify himself as to who he was?

A. No, he did not.

[104] Q. Did you know who that person was?

A. No, I did not.

Q. What did that person say to you as best you recall?

MR. WILLIS: Objection, your Honor.

THE COURT: Overruled.

A. That person told me that I also—we talked about who was going to pay, and he said—

Q. Did you say he asked you who was going to pay?

A. No. I asked—

MR. DeVAN: I'll object, your Honor. May I have a continuing objection to this?

THE COURT: Yes, sir, you may.

BY MR. BAKEMAN:

Q. Proceed, Mr. Greathouse.

A. Well, let's start again.

Q. What did he say, the second individual?

A. The second individual, I asked him how it was going to be paid for. He told me that he would pay 15,000 up front.

Well, I asked him if Mr. Lonardo was going to stand good for this order and he said no. He said he was going to pay 15,000 up front upon delivery of the cocaine and then upon acceptance after it was tested then I was supposed to be paid the balance.

Q. Was there any other conversation regarding the [105] cocaine or the Christmas trees?

A. Yes. The quality, the purity, the amount of rock formation in the cocaine because it comes in rock formation and a powder formation.

Q. Well, specifically do you recall what the second individual asked you about the quality of the cocaine?

A. Yes, I do.

He asked me what was the hard content and I told him approximately 90 percent.

Q. What do you mean by hard content?

A. That is the rock form of the cocaine. When cocaine comes in a rock form most normally it's of the highest of quality unless it's a rerun form.

And then he asked me about the clarity of the cocaine.

Q. And what was your response?

A. It was mother's pearl. Cocaine comes in the form of mother's pearl, mother of pearl and various other forms but mother of pearl is one of the higher qualities of cocaine.

And he asked me the clarity of the cocaine and I told him it was running roughly—I told him the clarity of the stones, of the diamonds are approximately 98 percent which would have been the purity of the cocaine.

Q. Well, how does cocaine normally come and by reference to purity?

[106] A. It could come anywhere from 10 percent to 98 percent.

* * * *

[109] Q. Now, after you had this conversation with the friend of Lonardo's on the telephone regarding the rock content, the clarity of the cocaine, did there come a time [110] when you talked again with Lonardo on that same phone call?

A. Yes.

Q. Okay. What was the nature of that conversation?

A. We—I talked to him about a delivery date.

Q. What did Lonardo say about the delivery date of the cocaine?

A. Mr. Lonardo said he would call me back.

Q. Was that the end of that phone conversation?
A. Yes, it was pretty much the end.
Q. Is that basically what you recall the phone conversation to be on May 25, 1984?
A. Yes, sir.
Q. Did you have a third phone conversation with Lonardo on May 25th?
A. Yes, I did.
Q. And to the best of your knowledge, how did that phone call originate; did he call you or did you call him?
A. He called me on the page unit.
Q. And after you received the call on your page unit, what if anything did you do?
A. I went immediately—well, first I rigged the Nagra, the tape recorder on my body. Then I went to the lobby to a pay phone to make the phone call.
Q. Who was present when you made this third phone [111] call?
A. Mr. Dick Dorton.
Q. And I take it the phone conversation was recorded?
A. Yes, it was.
Q. Did the FBI obtain consent for the recording of that telephone conversation?
A. Yes, they did.
Q. And from whom did they obtain that consent?
A. Myself.

(Pause.)

Q. Mr. Greathouse, showing you what's been marked for identification purposes as Government's Exhibits 13-A and 13-B.
A. 13-A.
Q. Can you identify 13-A, please?
A. 13-A is a tape recording of my conversation.
Q. And 13-B?
A. It's a transcript of my conversation.
Q. Have you had the opportunity to review the tape and transcript?
A. Yes, I have.

Q. And are the tapes and transcripts accurate as to the best of your recollection of the conversation on the 25th?
A. Yes, they are.
[112] Q. Now, you indicated that this phone conversation was recorded; is that correct?
A. Yes, it was.
Q. And it was with a body recorder?
A. Yes, it was.
Q. How were all the other phone conversations monitored?
A. They were—well, we had a recorder like sitting here and it had a suction cup that stuck right on top of the telephone from a regular phone.
Q. And that recorder was up in the motel room; is that correct?
A. Right.
Q. So the recording of this phone call, was that first time the Government used this particular procedure to the best of your knowledge?
A. No, it definitely was not.
Q. No. With the body recorder?
A. Oh, with this procedure, yes, the procedure to record it.
MR. BAKEMAN: Do you want to put your headsets on, please?
For the record, your Honor, this is Government's Exhibit 13-A and we are playing Side A.
THE COURT: Very good.
[113] (Tape played.)

BY MR. BAKEMAN:

Q. After you received these instructions from the defendant Lonardo, what next did you do?
A. Well, at that time I prepared to make the delivery.
Q. And where was the delivery to take place?
A. At the Hilton Hotel, behind the Hilton Hotel in the parking lot by Rockside and 77.

Q. Prior to leaving for the Hilton Hotel on Rockside, did you receive anything from the FBI?

A. Yes, I did.

Q. What was that?

A. One kilo of cocaine.

Q. How was the kilogram of cocaine packaged?

A. It was in a plastic package similar to this and placed into a yellow bag.

Q. Would you recognize the yellow bag and the cocaine if you saw it again?

A. Yes, I would.

Q. Mr. Greathouse, showing you what's been marked for identification purposes as Government's Exhibit 14-A, can you identify that, please?

A. Yes. This is the yellow bag that we used. It's a Sheraton clothes bag.

Q. And what was contained inside that bag?

[114] A. A kilo of cocaine.

MR. BAKEMAN: Just a second, your Honor.

(Pause.)

Q. Sir, showing you what's been marked for identification purposes as Government's Exhibit 14-B, can you identify this?

A. Yes, it's cocaine.

Q. Okay. And was that the cocaine contained in the yellow Sheraton bag?

A. I can't say it is because it's packaged wrong.

Q. How was it packaged when you originally put it in the yellow bag?

A. In one large package of roughly 1,000 grams of cocaine. It wasn't broken down that way. That was—

Q. Would it refresh your recollection if it was in four quarter kis?

A. Yes, it was.

Q. And from whom did you obtain Government's Exhibit 14-B?

A. The Federal Government.

Q. Where did you place Government's Exhibits 14-A and 14-B in your car?

A. Under the passenger side of the automobile, passenger seat.

* * * *

[116] Sheraton to the Rockside.

Q. And what happened as you arrived at Rockside and the Hilton Hotel?

A. I arrived at the bottom of the hill just before you go up to the hotel, and Mr. Dorton got out of my car I think at the Bob Evans right at the bottom of the hill, he got out of my car there and then he and Mr. Connole followed me from the restaurant up the hill into the parking lot until I parked my car and watched me.

Q. Are you familiar with the Hilton Hotel there off of Rockside and 77?

A. Yes, I am.

* * * *

[118] Q. Can you use the photograph to indicate to the jury how you went into the Hilton Hotel?

A. Yes. Got out of the car here and this is a walkway going into the side door of the hotel. Got out of the car and I went into the hotel through right here (indicating).

Inside the hotel we met approximately here. There is a wall there with telephones.

[119] Q. And did you meet anybody inside the Hilton Hotel?

A. Mr. Lonardo I met.

Q. Okay. By the way, were you wearing a body recorder at this time?

A. No, I wasn't.

Q. Did you have a conversation with Mr. Lonardo?

A. I just met him and told him "Here's the keys." At that time my pager went off and I told him I had to make a phone call then at that time, so he just left and went ahead and walked outside.

Q. Now, do you recall what his instructions were to you during the initial phone conversation before you left for the Hilton?

A. Yes. He told me to come, park the car in the parking lot. He didn't say—well, he said "Behind the Hilton in the parking lot, and come inside and give me the keys."

Q. And you gave him the keys; is that correct?

A. Yes, I did.

Q. After you gave him the key, what occurred next?

A. At that time then he went ahead and walked out of the building. I don't know to what point.

So I went ahead and proceeded to make my phone call. And Mr. Lonardo—I was talking on the phone and then he come out to a point, like I said I don't know [120] where, then he came back in to see me.

Q. Did you and he have a conversation at that time?

A. Yes, we did.

Q. What was the nature of that conversation?

A. Well, he came back in and he asked me what kind of a car was I driving and what part of the car the cocaine was stored away in.

Q. What did you tell him?

A. I told him I was driving my black Chevelle and showed him—pointed pretty much where it was parked at and told him it was—the cocaine was under the passenger side of the seats.

* * * *

DIRECT EXAMINATION OF
HARDRICK CRAWFORD, JR.

[598] BY MR. McHARGH:

Q. Now, do you recall a meeting that took place between Mr. Greathouse and a gentleman by the name of Angelo Lonardo?

A. There were several meetings.

Q. And directing your attention to May 12 of 1984, do you recall a meeting on that date?

A. Yes, I do.

MR. WILLIS: Your Honor, I raise an objection that was raised with reference to the questions of this nature previously.

THE COURT: Well, let's approach side bar so there is no confusion.

(Thereupon, the following proceedings were had at the side bar out of the hearing of the jury:)

MR. WILLIS: I am reemphasizing the objections that I made earlier in connection with the testimony by Mr. Greathouse concerning these prior conversations he supposedly had with Mr. Lonardo, whether taped or untaped, recorded or unrecorded I guess is a better word.

I continue to maintain that no conspiracy has been [599] shown. But even if we assume that a conspiracy existed between Lonardo and Bourjaily, the inception couldn't possibly be more than the 23rd or 20-something, a day or two before when the phone call was made in which some stranger was on the phone, that would be the inception of the conspiracy.

And I don't feel that you can retroactively make one a member of a conspiracy. And therefore this conversation that supposedly took place two weeks before wouldn't under any circumstances be admissible against Mr. Bourjaily.

THE COURT: All right. In other words you have a continuing objection as the Court says you could have.

MR. WILLIS: Right. I want to reemphasize that such is the case.

THE COURT: Fine.

MR. DeVAN: Your Honor, I have no objection to his observations, but if we are going to get into any conversations he had with Greathouse in relation to Mr. Lonardo or setting up Mr. Lonardo, I would certainly object to that.

* * * *

DIRECT EXAMINATION OF RICHARD DORTON

* * * *

[745] Q. Where were you when the call was received on the beeper on May 24th?

A. We were at the Sheraton airport in Cleveland.

Q. Who else was present?

A. Special Agent Crawford, Cohrs, and Fiatal.

Q. After the pager was activated, what if anything occurred?

A. Greathouse returned a telephone call to the number that had called him which was printed on the pager.

Q. Was that telephone call in any way recorded?

A. I believe it was. I don't remember.

Q. Do you recall reviewing with anyone the content of the first phone call about 2:30 on May 24th?

A. Yes, I did, after the calls. I think I was present during the call, as I remember.

Q. Was the person on the other end of the phone identified by Mr. Greathouse?

[746] A. He identified Mr. Lonardo.

Q. Okay. And did he tell you what Mr. Lonardo and he had talked about on that first phone call on May 24th, 1984.

MR. DeVAN: Objection, your Honor.

THE COURT: You may answer yes or no.

A. Yes.

BY MR. BAKEMAN:

Q. What next occurred on the 24th relative to this investigation?

A. That evening, about 7:30, he received another page with the same code.

Q. Okay. And after the beeper was activated, what if anything did Clarence Greathouse do?

A. He returned a call to the number that was printed on the beeper.

Q. After he returned the call, did he identify the person to whom he was talking with?

A. Mr. Lonardo.

Q. Did you have a conversation with Mr. Greathouse as to the nature of the conversation between himself and Mr. Lonardo at approximately 7:30 on the 24th?

A. Yes, sir.

Q. And what did Mr. Greathouse tell you?

MR. DeVAN: Objection.

[747] THE COURT: Sustained.

BY MR. BAKEMAN:

Q. What next occurred on the 24th?

A. He received another call about 10:30.

Q. And where was Mr. Greathouse when he received the call on the beeper, or excuse me, where was the call received?

A. It was on his beeper with the code 007.

Q. And after he received that call, what next occurred?

A. He returned the call to Mr. Lonardo.

Q. And after the phone conversation between Mr. Lonardo and Mr. Greathouse, what if anything did either yourself or Mr. Greathouse do?

A. He went to the lobby of the Sheraton and met with Mr. Lonardo.

Q. Okay. Where were you?

A. I was behind him. I followed him downstairs.

Q. Where did Mr. Greathouse go?

A. They went into the coffee shop.

Q. Do you recall approximately how long they were in the coffee shop?

A. About 10 minutes.

Q. And this was the coffee shop at the Sheraton Hopkins; is that correct?

[748] A. That's correct.

Q. Where did you station yourself while they were at the coffee shop?

A. In the lobby across from the entrance to the coffee shop where I could see the entranceway.

Q. Subsequently did you observe anybody leaving the coffee shop?

A. About 10 minutes after they—Greathouse entered, he and Mr. Lonardo came out and walked up the hall to the elevator bank.

Q. This person that saw you exit the coffee shop there at the hotel, do you see him in the courtroom today?

A. Yes, sir.

Q. Would you please identify him and indicate to the Court and jury what he is presently wearing?

A. It's the gentleman seated facing the—at the far side of the table wearing a brown coat and yellow shirt.

MR. BAKEMAN: Your Honor, may the record reflect the witness has identified the defendant Angelo J. Lonardo?

THE COURT: It may.

BY MR. BAKEMAN:

Q. After you observed Mr. Lonardo and Greathouse exit the coffee shop, where did they proceed to go?

A. Took the elevator to the sixth floor.

[749] Q. And where did you go?

A. Took another elevator to the sixth floor.

Q. Can you tell the jury the events that occurred up there on the sixth floor, as best you recall?

A. They walked down the hall toward Mr. Greathouse's room. I followed them, and his room was down the hall and around a corner.

I waited until they turned the corner and started down the hall. And Mr. Lonardo stepped back and looked down the hall at me, and I turned and fumbled in my pocket like I was taking a key out to put it in a room door there.

Q. Did there come a time when Mr. Lonardo and Greathouse went into a room?

A. Yes, sir.

Q. After they entered the room, where did you go?

A. To the room next door.

Q. Were you able to observe from the room you were in as to what was taking place with Lonardo and Greathouse?

A. Yes, sir. I could observe through a video monitor the activities in the room with Mr. Lonardo and Greathouse, and I could hear the conversation through a mike that was in the room.

Q. Were you able to hear the conversation between Mr. Lonardo and Mr. Greathouse?

[750] A. Yes, sir.

Q. By the way, after you were in the room, did there come a time when Mr. Greathouse exited his room?

A. Yes, sir. He came to the door of the room I was in, and was given two grams of cocaine.

Q. And were you able to observe what had happened with the two grams of cocaine that was given to Clarence Greathouse?

A. They took it back into Greathouse's room. Mr. Lonardo was seated at a table in the room and Greathouse sat down across from him and handed him the cocaine.

Q. Was any portion of that cocaine used on the 24th?

A. Yes.

MR. DeVAN: Objection, your Honor.

THE COURT: He may answer.

BY MR. BAKEMAN:

Q. Yes?

A. Yes. They cut a couple of lines there.

Q. What happened to the balance of the cocaine the evening of the 24th?

A. Mr. Lonardo put it in his pocket and left with it.

Q. Okay. Turning your attention to May 25th, 1984, were you again active in the investigation now before the Court?

[751] A. Yes, sir.

Q. Approximately when did you arrive in the company or the presence of Clarence Greathouse?

A. Shortly after noon.

Q. Okay. And when if anything, or what time was the first thing to have occurred relative to this case?

A. About 5:30 in the evening, Greathouse got a page from Mr. Lonardo.

Q. Were you present when the page was activated?

A. Yes, sir, I was.

Q. Did you observe the readout on the page?

A. Yes, sir, I did.

Q. And can you again tell the jury the observations of the page as you best recollect?

A. I don't remember the number, but it was 007 as it had been the day before.

Q. After the page was activated, what if anything did Clarence Greathouse do?

A. Returned a call to Mr. Lonardo.

Q. Where did he return the phone call from?

A. From the—(pause) from the lobby of the hotel.

Q. The first phone call that he received on May 25th?

A. I don't remember which call it was. One of the calls he returned immediately from his room and—

Q. And after he—excuse me for a second. (Pause.) [752] And after he immediately returned the first phone call, was there a second phone call made?

A. Yes, sir.

Q. Where was the second phone call made from?

A. From the lobby telephone bank adjacent to the elevators.

Q. Between the first phone call and the second phone call, did you have a conversation with Clarence Greathouse?

A. Yes, sir.

Q. Did he tell you why he had to go to the pay phones in the lobby of the Sheraton hotel?

A. Mr. Lonardo—

MR. DeVAN: Objection.

THE COURT: He may answer.

Did he tell you; yes or no?

THE WITNESS: Yes.

BY MR. BAKEMAN:

Q. What did Mr. Greathouse tell you as to the reason to go to the lobby?

MR. DeVAN: Objection, your Honor.

THE COURT: Overruled.

A. Mr. Lonardo was upset with him for making a call from a non-pay phone.

Q. Now, the first phone call—

[753] THE COURT: Now again I instruct the jury that as to what Mr. Lonardo was upset about, that testimony, that's just to be used by you as to what he said; not for the truth of what he said.

BY MR. BAKEMAN:

Q. The first phone call on May 25th at approximately 5:30, was that recorded up in the room that he was in?

A. Yes.

Q. Okay. The phone call down in the lobby, was that recorded?

A. It was not.

Q. Can you tell the jury why that phone call was not recorded?

A. It was at a public phone and there were other people in the area, and it was just difficult to put a recorder on a phone in a public area.

Q. That Mr. Greathouse was making his phone call to Mr. Lonardo, was that the only investigation going on that evening?

A. No, sir.

Q. Were you present when that second phone call was made down in the lobby?

A. Yes, sir.

Q. Besides yourself and Mr. Greathouse, were any other persons present?

[754] A. No other FBI people were there. There were people in the area, but I was next to him when he made the call.

Q. What was your role during the conversation between—was that to be between Greathouse and Lonardo?

A. I was attempting to overhear as much of the call as I could.

Q. Were you able to hear what Mr. Greathouse said?

A. Yes.

Q. Were you able to hear at any time any portions of the conversations from the person who was calling Mr. Greathouse?

A. Yes.

Q. Were you able to distinguish as to how many people were speaking on the phone?

A. Yes.

Q. And how many people were speaking on the phone?

A. There were two talking to Mr. Greathouse at separate times.

Q. At separate times. Now, do you recall what Mr. Greathouse actually said on the telephone down in the lobby of the Sheraton Hopkins?

A. I heard—

MR. DeVAN: Objection, your Honor.

THE COURT: Yes or no?

THE WITNESS: Yes.

[755] BY MR. BAKEMAN:

Q. What did you hear Mr. Greathouse say?

MR. DeVAN: Objection.

THE COURT: Overruled.

A. He responded to a statement made by Mr. Lonardo about—he was asked the question or he was—Mr. Lonardo made the statement that he had a buyer for the Christmas trees. And there was discussion about the clarity and the rock content of the merchandise.

Q. Now, did there come a time when a third phone call was had on May 25th, 1984?

A. Yes.

Q. Do you recall approximately what time that was?

A. Approximately 7:30, 7—just before 8:00 o'clock, I believe.

Q. Where did that phone call take place?

A. Again at the same phone bank in the lobby of the Sheraton.

Q. And prior to that phone call being made, had Greathouse received any message or was his page in any way activated?

A. Yes.

Q. Did you see the page when it was activated?

A. Yes.

Q. Do you recall what you observed on the screen of [756] the page?

A. It was the same phone exchange. I don't remember the number, but it was again 007.

Q. And you indicated this third phone call was made in the same lobby as the second one; is that correct?

A. Yes, sir.

Q. Was there any difference, though, as far as the manner in which that phone call was made as compared to the first one down in the lobby?

A. Yes, sir.

Q. What was the difference?

A. That call was recorded.

Q. How were you able to record the phone conversation this time, whereas before you were not able to record the conversation?

A. We were able to put a body recorder on Mr. Greathouse. And I was able to take the microphone from the recorder and the way I positioned Greathouse at the telephone, to put the mike over the earpiece of the phone.

Q. Now, did you have a conversation with Mr. Greathouse after this third phone call on May 25th?

A. Yes.

Q. Where did that conversation take place?

A. Back up in the room that was next to Greathouse's [757] room.

Q. By the way, backing up for a moment, after the second phone call, or the first phone call from the lobby, did you have a conversation with Mr. Greathouse about the content of that phone conversation?

A. Are you talking about the 5:00, 5:30 call?

Q. Right, from the lobby.

A. Yes.

Q. Who was present when Mr. Greathouse was debriefed regarding that conversation?

A. Myself, Agent Cohrs, Fiatal and Crawford, and I think Connole maybe.

Q. Going back to the one that was made between 7:30 and 8:00 o'clock, did you go back to the motel room?

A. Right.

Q. Did you have a conversation with Clarence Greathouse regarding what the conversation was had between himself and Mr. Lonardo?

A. I think we went back in and made the tape on that one.

Q. Do you recall the content of that tape?

A. Yes.

Q. What do you recall the content to be?

MR. DeVAN: Objection again, your Honor.

THE COURT: Sustained.

[758] BY MR. BAKEMAN:

Q. Did you and Greathouse have any conversation as to what steps would take place next?

A. Yes.

Q. And who else was present during this discussion?

A. Same agents I have named previously.

Q. What was decided?

A. That we would take a kilo of cocaine and transport it, per instructions that had been given, to the Hilton hotel on Rockside Road.

Q. Okay. Who gave the instructions?

MR. DeVAN: Objection.

MR. BAKEMAN: I'll withdraw that for a moment.

BY MR. BAKEMAN:

Q. When you talked to Mr. Greathouse after this third phone conversation, did he identify the person he was talking to?

A. Yes.

Q. And who did he identify the person to be?

MR. DeVAN: Objection again, your Honor.

THE COURT: Overruled.

A. Mr. Lonardo.

Q. You heard the tape of that conversation; is that correct?

[759] A. That's correct.

Q. Were there any instructions given in that tape-recorded conversation?

A. Yes, sir.

Q. Do you recall what the instructions were?

MR. DeVAN: Objection.

THE COURT: Sustained.

BY MR. BAKEMAN:

Q. But you knew what the instructions were; is that correct?

A. Yes, sir. They were on the tape.

Q. Now, regarding the cocaine, what if anything did you do?

A. Agent Fiatal and myself placed four quarter keys in a Sheraton plastic laundry bag and I accompanied Greathouse to his car, and we drove to the Hilton Inn on Rockside Road or drove to the Bob Evans restaurant in front of the Hilton Inn on Rockside Road.

Q. Would you recognize the yellow Sheraton bag if you saw it again?

A. Yes, sir.

* * * *

[773] Q. After you observed Lonardo and Greathouse in the lobby, what if anything did you do?

A. Lonardo was facing me, facing the doors, so I backed my car out of this—out from under this portico and away from the plate glass doors.

I was afraid he would recognize me. I backed out into the parking lot then and drove down this way.

Q. Can you show the jury the path your vehicle took?

A. I came, backed out from under the portico and came south in the parking lot in the driveway lane that is just next to the hotel.

I came down near the end of the parking lot, and made a right turn into the center lane of the park area.

Q. While you were driving your vehicle, did you observe anything unusual?

A. I saw a white Olds Toronado with a male, white male sitting behind the steering wheel parked right in this area here. Unusual because he was—

MR. WILLIS: Objection.

THE COURT: Sustained.

BY MR. BAKEMAN:

Q. Can you tell the jury why it was unusual for the male sitting there?

MR. WILLIS: Objection, your Honor.

THE COURT: He can answer that.

[774] A. He was facing away from the hotel and he was in an area away from the other parked cars. It looked suspicious to me.

Q. Were you able to observe the person sitting in the vehicle?

A. Yes, sir.

Q. Would you recognize that person again if you saw him?

A. Yes, sir.

Q. Do you see him in the courtroom today?

A. Yes, sir.

Q. Would you please identify him for the Court and jury and indicate what he is presently wearing?

A. That's Mr. Bourjaily. He is wearing a gray sports jacket and blue slacks.

MR. BAKEMAN: Your Honor, may the record reflect the witness has identified the defendant William Bourjaily?

THE COURT: It may.

BY MR. BAKEMAN:

Q. After you observed Bourjaily sitting in the white Toronado, where did you proceed to go?

A. I drove north in the center parking lane and pulled into a parking spot about four car—about four spaces away from Greathouse's car.

[775] Q. If you saw a picture of the Toronado again could you recognize that?

A. I think so, yes, sir.

Q. Showing you what's been marked for purposes of identification as Government's Exhibit 17, can you identify that?

A. That's an Olds Toronado exactly like what was sitting in the parking lot.

Q. And one that Bourjaily was sitting in?

A. Yes.

Q. After you parked your vehicle, what if anything did you do?

A. I observed Mr. Lonardo exit the side door of the hotel and come down the walk to Greathouse's car, walk around the car on both sides.

He went down one side, came back the other, and then walked in this direction, walked south. And at that point there was a car in front I think that people had gotten into and turned their lights on, and I turned and looked the other way.

Q. So did you see where Mr. Lonardo walked to?

A. I saw him walk this direction. I didn't see him—I didn't see where he went.

Q. Did there come a time when you again saw the defendant Lonardo?

[776] A. Yeah. When I looked back around, after a few minutes I was looking the other direction trying to find some of our personnel, he was walking back to the 1970 Chevelle, Greathouse's car.

Q. He being defendant Lonardo?

A. Mr. Lonardo.

Q. Okay. And after he got back to the Chevelle, what if anything occurred?

A. He unlocked the right passenger door, leaned in.

Q. How did you know that the door was locked?

A. I locked it when I had gotten out of the car at the restaurant.

He reached under the seat and took out this yellow laundry bag.

Q. Government's Exhibit 14; is that correct?

A. That's correct.

Q. And did you know what Government's Exhibit 14 contained?

A. Yes, sir.

Q. What was that?

A. That was four quarter keys of cocaine.

Q. Now, how far away from Lonardo were you when you were making these observations?

A. Maybe three or four parking spaces.

Q. Was there anything obstructing your view from where [777] you were parked to where Mr. Greathouse's car was parked?

A. No, sir. There was a car sitting next to me, but it was a 280Z Datsun with a low front end and I was looking over—right over the hood of that car.

Q. After Mr. Lonardo removed the yellow laundry bag containing the cocaine, what if anything did you see Mr. Lonardo do?

A. He walked from Greathouse's car to the Toronado like was pictured a moment ago here, and handed the yellow bag to Mr. Bourjaily.

Q. Where was Mr. Bourjaily's car parked at that time?

A. He had moved up and was about either two or three parking spaces south of Greathouse's car.

Q. And after you you saw Mr. Lonardo give the defendant Bourjaily the package of cocaine, what if anything did you do?

A. I backed my car out and pointed my front end in the direction of Mr. Bourjaily's car.

* * * *

[778] A. This is the motel and the walkway. And the location of Greathouse's car, it's a little out of proportion, my car and Mr. Bourjaily's car.

Q. Now, which direction was Greathouse's car facing?

A. Toward the motel.

Q. (Marking.) Would that be a fair diagram?

A. Yes, sir.

Q. Which direction was Mr. Bourjaily's car facing?

A. Same direction.

Q. (Marking.) Would that be again a fair representation of the direction of Bourjaily's car?

A. Yes, sir.

Q. Where was Bourjaily sitting in the car when you observed Lonardo hand him the package?

A. Driver's seat behind the steering wheel.

Q. And between your car and the Bourjaily car, were there any other vehicles?

A. Yes.

Q. Where was that located?

A. There was a vehicle next to me right here, and there was another one that was parked well back that I had an open view right down to his car.

Q. Then you indicated after you saw Lonardo hand the package to the defendant, you pulled your car out; is that correct?

[779] A. That's correct.

Q. And where, what direction did you head?

A. I pulled out and pulled this direction—I'm sorry—pulled out and pulled in this direction where my headlights were shining on Mr. Bourjaily's car.

At that time, as soon as the package was handed from Mr. Lonardo to Mr. Bourjaily, the agents knew then to effect the arrest, and that's why I moved my car in that position.

Q. You can resume the stand.

MR. BAKEMAN: Just a second, your Honor.

(Pause.)

BY MR. BAKEMAN:

Q. Now, Mr. Dorton, you indicated that it was dusk; is that correct?

A. That's right.

Q. Did you have any problem observing what you had testified to having occurred on May 25th, 1984?

A. No, sir.

Q. And what time of day was this again?

A. A few minutes past 8:45.

Q. 8:45.

* * * *

[792] BY MR. WILLIS:

Q. What would be your best estimate as to the precise time that the arrest took place, the arrest of Mr. Bourjaily?

A. 9:00 o'clock or a minute or a few minutes before.

Q. And that arrest followed within seconds of the point when you say you observed Mr. Lonardo hand something to Mr. Bourjaily?

A. That's correct.

Q. Now, earlier you had testified about the lighting conditions at that particular time of day, and you said —you described it as being dusk for the want of a better word; correct?

A. That's correct, sir.

Q. Then at another point later you indicated that before this alleged transfer took place, that some person in a car turned on their lights and you sort of turned your head away, something to that effect, do you recall that?

A. Yes, sir.

Q. Right. So at least we can conclude from that that apparently that person felt they needed lights to drive their vehicle?

A. It was dusk. The vehicles coming in and out of the parking lot all had their lights on, and the parking lot overhead lights were on.

* * * *

[796] Q. So you can't tell us even whether or not he was in the hotel when Lonardo exited, can you?

A. No, sir.

Q. How long had you been in the parking lot of that hotel when Mr. Lonardo exited the hotel?

A. I don't—I didn't see him exit the hotel. When I saw him—

Q. When you saw him—

A. —I had been in the parking lot about two to two and a half minutes at that time. Yeah, two to two and a half minutes, probably.

Q. Now, one of the things that you told us was that when you saw Mr.—the car you have identified as being the one Mr. Bourjaily was in, that something appeared to be unusual about that?

A. Yes, sir.

Q. In other words, it was unusual for one person to be sitting in a hotel lobby in a car, that's unusual?

A. Well, the unusual part was that he was sitting away from the entrances and away from all other vehicles and sitting facing away from the hotel looking in the opposite direction.

Q. So you concluded that that was unusual because he [797] was sitting away from everybody?

A. Yeah. There is a narcotics deal going down so and he was away from everything sitting there by himself and he was someone that I didn't recognize, so I looked at him.

Q. Well, certainly if he was privy to the narcotics deal going down, it would seem he would try to put himself in a group where he wouldn't be conspicuous by being out there in the open, wouldn't he?

A. I don't know.

Q. You don't know?

A. I'm really not sure but.

He was unusual and I took a look at him, took a look at the car.

I was also looking, sir, for other of our agents because I'm not from Cleveland and there were agents out there that I didn't know and I wanted to be sure that I didn't put myself in a position of jeopardy when this arrest went down because they didn't know me.

Q. Now, did you see a van parked out there way off from everything else and the other cars?

A. Yes, sir.

Q. Did that appear unusual to you?

A. I knew what the van was.

Q. Right. It didn't appear unusual to you because you [798] knew that was an FBI van?

A. That's right.

Q. But if you had not been an FBI agent, and this van was sitting over there by itself, that would have appeared to you to be unusual, wouldn't it?

A. It was unusual, but the van was parked on the back side of the south, extreme south side of that parking lot against the outside perimeter of the parking area.

Q. Off by itself?

A. No. There was a couple other cars to the right of the van, as I remember.

Q. Now, there were a number of cars in that lot; correct?

A. Oh, in the parking lot?

Q. Yes.

A. Oh yes. Absolutely.

Q. It was crowded, it was a Friday night; correct?

A. The front area was crowded, yes.

* * * *

[800] Q. So there was at least some cars between your car and Greathouse's car; correct?

A. Yes, sir.

Q. Right. And there were at least twice as many cars between your car and the spot that you have indicated Bourjaily's car was in?

A. I think I said that there was a car beside me and that the other spaces were open there. There was maybe a car beside me and maybe one more.

And Mr. Bourjaily's car, if you will note, was pulled over the stripe that divides the parking areas. It wasn't set right in the middle of that parking space. It was moved forward a couple of feet so it made my view very easy.

Q. You now remember that to be the case. You are aware you didn't tell us that before; correct?

MR. BAKEMAN: Objection, your Honor.

THE COURT: Overruled. He may answer.

BY MR. WILLIS:

Q. And you are aware you didn't mention anything about Mr. Bourjaily's car being over this line that divides the spaces between the two cars?

A. I didn't mention it. I didn't realize that I [801] didn't.

Q. Oh, you didn't. Did you put it in any report?

A. Did I?

Q. Yes.

A. No, sir. I wrote no reports.

Q. So you are depending on your memory now which is about six, seven months old?

A. Right.

Q. Why didn't you write that down at the time since it was significant that you could see over this—

A. There were other agents.

Q. —Datsun?

A. There were other agents there, Mr. Willis, that put together an arrest log.

And I felt that the information that was in the log was sufficient to cover what had gone on that night.

Q. But the log doesn't even address your observations, does it?

A. No, sir.

Q. But you did deem it significant when you originally testified to mention the smallness of this Datsun which allowed you to look over top of the car and have a good view of Bourjaily's car, you told us that the first time around?

A. Right.

[802] Q. And you also told us as a matter of fact that there was some other car that had backed out?

A. Not pulled all the way forward.

Q. Not pulled all the way in, in order to further accommodate your testimony; correct?

A. That was my statement, I think.

Q. Now, this bag, Exhibit 14-A, is that a bag that sort of lights up, you know, when artificial light hits it and a fluorescent type?

A. I don't think so.

Q. You don't think so.

A. No.

Q. So then it would just appear to be a dull bag at night?

A. It's a yellow bag at night.

Q. You could see that, you could say it was yellow as distinguished from some other color?

A. It is certainly not black or maroon.

Q. Okay. Now, would you say then that the distance from where you place Mr. Bourjaily's car, to the back, the perimeter of this lot in the area under these bushes

or nearby where you placed the FBI van, would you say that's in excess to 250 feet?

A. I don't think so, no. I don't—

Q. 200?

[803] A. A hundred 50 at the most.

Q. Would you accept the statement that it's 208 feet?

MR. BAKEMAN: Objection.

MR. WILLIS: He might reject it.

THE COURT: He may answer.

BY MR. WILLIS:

Q. Yes. Okay?

A. If that's what the distance is, I would accept it, yes. I wouldn't argue with that.

Q. Okay. And certainly there were some cars between this point where you have indicated appproximately the FBI van was parked, and the area up in here where you have indicated Greathouse's car was parked and where you indicated Mr. Bourjaily's car was parked, there were other cars between Bourjaily's car and the agents van; right?

A. I think, yes. Yes.

Q. All right. Now, and this van, the height of the van is—what type of van was it, incidentally?

A. What do you mean what type of van?

Q. Was it a Ford, was it a Datsun?

A. No. It was an American made like a Dodge 200 series, a Chevy 20 series, a Ford 250, 150.

Q. So it would make it approximately just slightly higher than this car here?

A. Top of the van I guess would be six foot or maybe a [804] little more.

Q. And it has a back window and a side window?

A. Yes, sir.

Q. Right. So that if that is the type of van that these officers were in, certainly they would have a lot of difficulty seeing through the cars what was taking place in Bourjaily's car, wouldn't they?

A. Mr. Willis, I don't know what they saw from that van.

Q. Well, just as a trained investigator, 15 years.

A. I wasn't in the van, sir.

Q. I understand. You can deal in abstractions, can't you?

A. Sometimes I think, yes.

Q. Let's do that. You have described the van and you have seen it. You told us that there were cars between the Bourjaily car and the van?

A. Yes, sir.

Q. You know the height of this car right here, and you have also told us that Bourjaily's car was pointed east which would place the driver on this side; correct?

A. Correct.

Q. Correct.

A. That's correct.

Q. And you said there were cars to the south of [805] Bourjaily between Bourjaily's car and the car the FBI agents were in, right, the van they were in, you said that?

A. Did I say that?

Q. Yes.

A. I don't remember saying that. I don't know. There were other FBI cars up there besides the van.

Q. We are talking about the van; right?

A. We are talking about the van.

Q. Right.

A. I wasn't in the van.

Q. Given those facts, don't you agree that the persons in the van wouldn't be able to see any activity that was taking place on the driver's side of the Bourjaily car?

MR. McHARGH: Objection.

THE COURT: Sustained.

BY MR. WILLIS:

Q. And you agree that simply because they are FBI agents, that doesn't give them the ability to see through metal?

A. Would I agree that—

Q. Yes.

A. —that an FBI agent can't see through metal?

Q. Right. With his natural eye.

A. Yes, I would.

[806] Q. Okay. Now, sir, how many feet would you say you were at this spot to where you placed the Bourjaily car.

50 feet?

A. 50 feet.

Q. 50 feet. And you are telling us that Mr. Lonardo went to the driver side or the passenger side of this Greathouse car?

A. I think my statement was, sir, that he went to the passenger side on his second trip to the car.

Q. And he left this car and walked up to this area where the Bourjaily car was parked, is that your testimony?

A. Walked up the driver's side of Mr. Bourjaily's car.

Q. And the Bourjaily car was still in this spot right here?

A. He had moved to that spot, yes, sir.

Q. He had moved to this spot, is that your testimony?

A. Yes, sir.

Q. Where was he before he moved to this spot?

A. Down in the end of the parking lot in the extreme south end.

When I went down and made the turn in the parking lot after leaving the front of the hotel, he was parked at the extreme south end of that parking area.

Q. Don't you agree that he had to pull in between two [807] cars to get in this spot?

A. I didn't see him pull in there so I don't know. There was no car beside him.

Q. There was no car north of him, is that what you are saying?

A. That's what I'm saying, yes, until you got to the cars next to me.

Q. And your car was pulled in as far as you could go, I take it, to occupy fully this space?

A. Yes, sir.

Q. Was there a car here?

A. Yes, sir.

Q. So that placed you on the north side of your car, the driver's side of that car; right?

A. That's right.

Q. What kind of car were you in?

A. In a Ford Fairmont.

Q. Is that a four door car?

A. No, sir.

Q. And you are telling us that Mr. Lonardo handed a package to Mr. Bourjaily?

A. Yes, sir.

Q. What hand did he give it to him, what hand did he have it in?

A. Two hands.

[808] Q. Two hands. It takes two hands to carry a thousand grams?

A. Are you asking me why he did that?

Q. No. No. I am asking you does it take two hands to carry a thousand grams?

A. It wouldn't for me. I can't speak for anyone else.

Q. Okay.

A. Wouldn't normally think so.

Q. And he carried it in front of him?

A. Yes, sir.

Q. No effort was being made to conceal it?

A. No. He had it like this (indicating).

Q. That follows, doesn't it, if he had it like that no efforts were made to conceal it; correct?

A. That's right.

Q. Now, what hand did Bourjaily take it in, or did he accept it in two hands—with two hands? I'm sorry.

A. I don't know.

Q. So what you are really telling us is that you saw him put it in the car and you assume Bourjaily accepted it in his hands; correct?

A. Correct.

* * * *

DIRECT EXAMINATION OF ROBERT FIATAL

[870] Q. And you reviewed the tape of that call, sir?

A. Yes, I did.

Q. Did you discuss the substance of the call with Mr. Greathouse?

A. Mr. Greathouse also discussed the substance, and comparing the two they were essentially the same.

MR. DeVAN: Objection.

THE COURT: Overruled.

BY MR. McHARGH:

Q. What next occurred, sir?

A. Mr. Greathouse, due to the instructions from Mr. Lonardo, had to go down to a pay phone in the lobby of the Sheraton Hopkins to return his phone call to Mr. Lonardo.

Q. And what happened, if anything?

A. Mr. Greathouse went down to make this call and he was accompanied by Special Agent Richard Dorton.

The call was made, Mr. Greathouse came back up to room 662, and there he related to me the contents of this conversation with Mr. Lonardo and another individual.

Q. Now, you said that Mr. Greathouse related to you the contents of that conversation?

A. Yes, sir, he did.

* * * *

[875] Q. That's the last call to which you made reference to?

A. Yes, sir.

Q. And that call was precipitated by first having received a call through the beeper; is that correct?

MR. DeVAN: Objection.
THE COURT: Overruled.
Is that correct is the question.
THE WITNESS: Yes, it is.

BY MR. McHARGH:

Q. And the beeper had gone off and 007 was in the beeper; is that correct?

A. 007 and the phone number 524-7806.

Q. And that phone number 524-7806 was located where?

A. Again it's a pay phone located within the lobby of the Hilton South in Independence, Ohio.

Q. Now, as a result of your review of the recording of that second call and your discussions with Mr. Greathouse, did you take any steps?

A. Yes. From the recording itself I was able to determine from Mr. Lonardo's instructions that the narcotics transaction was taking—

MR. DeVAN: Objection.

[876] THE COURT: Well, the question is did you take any steps?

THE WITNESS: Yes, I did.

BY MR. McHARGH:

Q. And what prompted you to take those steps, sir?

A. The recordings, the actual telephone conversations recording what I heard that evening.

Q. And what was it about that recording that caused you to take some steps?

MR. DeVAN: Objection.

THE COURT: Overruled.

A. The instructions were given by Mr. Lonardo on how to make a delivery of the cocaine.

Q. And what were those instructions?

A. The instructions were for Mr. Greathouse to proceed to the—

MR. DeVAN: Objection.

THE COURT: Overruled.

A. —back parking lot of the Hilton South, and he was to get out of his car, go into the Hilton, give the keys to the car to Mr. Lonardo.

Mr. Lonardo would proceed out to the parking lot where his friend would be waiting and he would take care of the transaction.

Q. Where whose friend would be waiting, sir?

[877] A. Mr. Lonardo's friend.

Q. Was Greathouse to take anything with him?

A. Mr. Greathouse was to take one kilogram of cocaine.

Q. Now, you are located there at the Sheraton hotel in room 660 or thereabouts?

A. Yes, sir.

Q. What did you next do then as a result of that call?

A. As a result of that call, we were once again very rushed because of other matters, but myself and Special Agent Dorton took four approximately one quarter kilograms of cocaine, each quarter kilogram being packaged in two ziplock type bags so they were double secured one inside the other.

We put those four into a yellow plastic—a Sheraton hotel laundry bag.

* * * *

[882] Q. What if anything did you observe after your arrival?

A. When we came in, as I said it was dusk, but there was sufficient light to see the entire area, the entire back lot of the Hilton South.

There were very few if any cars parked in this back portion of the rear lot. After we had been there a few minutes, we saw Mr. Greathouse's vehicle come from this direction, that being the front of the Hilton South, down this lane and park approximately in this space right here with the front of the vehicle facing towards the Hilton South.

Q. Did you make note of any other vehicle on that occasion?

A. Prior to Mr. Greathouse going into that parking space, it was noted that there was a white Oldsmobile [883] which was riding around parking in several areas. This was several minutes prior to Mr. Greathouse's arrival.

That was the same—the individual driving this vehicle was later identified as William Bourjaily.

Q. Showing you what's been marked as Government's Exhibit Number 17, do you recognize that?

A. Yes. This is a photograph of the car which William Bourjaily was driving that evening.

Q. And what was that car doing when you first noticed it, sir?

A. When I first noticed it, the driver, the car itself was driving around the back lot.

In fact when I first noticed it it had stopped right in front of us and the driver was looking over the van, the driver himself seemed to be looking over the entire area that we were parked in.

Q. And why did you make note of that?

A. It looked very suspicious, in fact, No. 1, he looked over the van, he seemed to be driving around the area and seemed very—just his movements seemed like he was looking over the entire area.

Q. And the individual that was driving that van, did you come to learn his identity?

A. Yes, sir. He was later identified as Mr. Bourjaily.

[884] Q. And if you saw him today would you recognize him?

A. Yes, I would.

Q. Could you identify him today?

A. Yes. He's seated at the defendant's table.

MR. McHARGH: Your Honor, may the record reflect an identification of the defendant William Bourjaily?

THE COURT: It may.

BY MR. McHARGH:

Q. All right, sir. What happened next?

A. After Mr. Greathouse pulled his vehicle in, he exited the vehicle and walked this way towards the Hilton South. Once he reached this corner of the building here he was outside our sight because of the angle.

Approximately one, maybe one and a half minutes later Mr. Lonardo came from the same direction as Mr. Greathouse had went into the Hilton South.

Mr. Lonardo proceeded directly to Mr. Greathouse's vehicle but—

Q. What if anything did he do upon arriving at Mr. Greathouse's vehicle?

A. Mr. Lonardo first looked in the driver's side window of the car, then walked around looking in the passenger side window of the car.

Q. By the way what kind of car was that?

[885] A. Black Chevrolet Malibu.

Q. All right. And you can continue, please.

A. After doing this, at this time the white Oldsmobile which I described earlier had parked in this space right here (indicating) facing away from the hotel.

Mr. Lonardo walked over to the vehicle and spoke to the driver of the vehicle. This driver later was identified as William Bourjaily.

Q. You couldn't overhear what he was saying?

A. No. I could just see Mr. Lonardo's lips move.

Q. All right. Continue.

A. Mr. Lonardo then walked back to Mr. Greathouse's vehicle. The driver of the white Oldsmobile William Bourjaily—

Q. What was that, sir?

A. —made a U-turn in this portion of the parking lot, drove up about two spaces down from Mr. Greathouse's vehicle, about one half car length behind Mr. Greathouse's vehicle.

Q. So if Greathouse was occupying the first row, that is his car?

A. Yes.

Q. Mr. Bourjaily's car would have stopped somewhat into that first row, but also—

A. Approximately one half car length behind, yes.

[886] Q. Were you able to see anything that happened after he arrived at that point that you have just described?

A. At that point Mr. Lonardo opened the passenger side door of the black Chevrolet Malibu, and crouched down, reached into the vehicle and pulled out the yellow plastic bag.

Q. By the yellow plastic bag, are you referring to Government's Exhibit 14?

A. Yes, sir, I am. And the same yellow plastic bag which you had me identify earlier.

Q. I believe that's 14-A. What happened next, sir

A. Mr. Lonardo turned towards the white Oldsmobile, carried the yellow bag over to the driver's window of the white Oldsmobile and handed it to the driver William Bourjaily.

Q. Now, was there anything obstructing your view of the events that you have just related to the ladies and gentlemen of the jury?

A. No, sir. No, sir.

Q. Would you go and get Government's Exhibit 14-A and show us, show the ladies and gentlemen of the jury how Mr. Lonardo carried that bag?

A. Mr. Lonardo carried the bag from the black Chevrolet Malibu to the white Oldsmobile being driven by William Bourjaily in this manner (indicating), carried it [887] to the driver's side, handed it through to Mr. Bourjaily who accepted it in the same manner.

Q. And you were able to see that, sir?

A. Yes.

Q. You can put that down.

Now, based on your vantage point from the rear of the van, you were looking through Mr. Bourjaily's car; is that correct?

A. A portion of what I saw was through the windows of Mr. Bourjaily's car.

Q. What happened next?

A. At the point that Mr. Bourjaily took the yellow package, myself and two other agents which were in the surveillance van exited the van, identified ourselves, ran to the two vehicles and placed Mr. Bourjaily and Mr. Lonardo under arrest for possession with intent to distribute cocaine.

Q. Do you recall approximately how long it took you to get from your van to Mr. Bourjaily's car?

A. It was approximately 50 yards, and I was running, probably dare say eight seconds.

Q. You run kind of fast.

A. I was running very fast, yes.

Q. And Mr. Lonardo and Mr. Bourjaily were placed under arrest?

[888] A. Yes. At the time of the arrival of the car, Mr. Bourjaily was still in the car, he was placed under arrest, removed from the car, and both were secured, that being they were handcuffed.

Q. Thank you. You can resume your seat, sir.

(Pause.)

Q. Sir, do you recall approximately when it was that you arrived at the Hilton Hotel?

A. It was approximately 8:42 p.m. that evening

Q. And do you have an idea or do you know how long after you arrived in terms of mintues or hours it took you to effectuate the arrest of Mr. Lonardo and Mr. Bourjaily?

A. Approximately six, five to six minutes.

Q. So everything you testified to after your arrival took about five, six minutes?

A. Yes, it happened very quickly.

Q. Now, in connection with the arrest of Mr. Bourjaily, did you cause a search of his automobile to be conducted?

A. Yes. After Mr. Bourjaily was secured, that being he was handcuffed, he searched the inside of the vehicle pursuant to the arrest of Mr. Bourjaily.

Q. Now, did you find the cocaine that Mr. Bourjaily had accepted?

A. Yes.

[889] MR. WILLIS: Objection.

THE COURT: Overruled.

A. I found it. You handed it to me before as what's marked as Government's Exhibit 14-A, the yellow plastic Sheraton laundry bag which contained approximately the four one quarter kilo packages of cocaine on the rear driver's side floor of the white Oldsombile.

* * * *

CROSS EXAMINATION OF ROBERT FIATAL

[927] BY MR. WILLIS:

Q. And when Mr. Lonardo walked from, after having come out of the hotel and gone near Greathouse's car, he walked across that open space, you didn't have any trouble seeing him; right?

A. Would you please repeat the question?

Q. Yes. If I recall, you said that Lonardo came out of the hotel and then at some point he walked over in this area, somewhere over here where Bourjaily's car was before, you tell us, Bourjaily pulled his car up a space and a half or two from Greathouse's car?

A. Yes. After he went to Mr. Greathouse's car, then he proceeded to Bourjaily's car.

Q. That's what I said.

A. Okay.

Q. And you saw Mr. Lonardo carrying this package in both hands; right?

A. Yes, sir.

Q. And he was walking toward you then?

A. Yes, sir. In the same direction that we were [928] facing or opposite direction actually.

Q. Well, you were facing him looking out the back window, weren't you?

A. Yes, sir. I think we are saying the same thing.

Q. Okay. Now, and you are saying that he handed this package to Mr. Bourjaily?

A. Yes, sir.

Q. And you could see that?

A. Yes, sir.

Q. Without any difficulty?

A. No, sir.

Q. As a matter of fact, the driver side of the Bourjaily car was further from you than was the passenger side of his car?

A. Yes. The car was facing the hotel.

Q. So you could see right through that window what was taking place on the opposite side of the car?

A. Just a portion of what I saw, yes.

Q. What does that mean, "a portion of what I saw"?

A. I didn't have to see through the windows to see Mr. Lonardo carrying a package towards Mr. Bourjaily, no.

A. But you would have to see through the window to see him hand it to Bourjaily, wouldn't you?

A. Once he lowered it, because of the depth perception, once he lowered it so far into the roof line.

[929] Q. He simply could have been putting it in the car?

A. No, sir, he wasn't. He handed it to Mr. Bourjaily.

Q. And Bourjaily took it with both hands?

A. Yes, sir.

Q. This picture down here of the car, did you cause that to be taken, the Bourjaily car? Did you identify this?

A. Yes, sir.

Q. Did you move the seats on that car before you had the picture taken?

A. No, sir, I didn't.

Q. Do you know who pulled the seat back as far as it could go before that picture was taken?

A. Pardon?

Q. Do you know who pulled the seat back?

A. No, sir. I don't know that it was pulled back.

MR. McHARGH: Objection, your Honor.

BY MR. WILLIS:

Q. The agents would pull that back and then take a picture to try to demonstrate how difficult it would be for somebody to put a package behind the driver, they wouldn't do a thing like that, would they?

A. No, sir, not for that reason.

Q. When that picture was taken, were any other people present other than law enforcement personnel?

[930] A. I don't know, sir.

Q. What do you think, do you believe there were a lot of people around that car?

MR. McHARGH: Objection.

THE COURT: Sustained. Sustained, counsel.

BY MR. WILLIS:

Q. Well, the FBI seized that car that night, didn't they?

A. Seized?

Q. Yes.

A. It was driven back to the FBI building.

Q. And the FBI had control over that car when the picture was taken?

A. Yes, sir.

Q. Did you ever ask that any prints be taken off of that bag there to see if you could identify Mr. Bourjaily's as being thereon?

A. No, sir. I saw Mr. Bourjaily handle that.

Q. Does that answer my question?

A. I say no, sir, I did not.

Q. You didn't stop at that, did you?

A. No, sir.

Q. In other words, you are certainly not going to suggest that prints can't be lifted off of that paper?

[931] A. I don't know, sir.

Q. You never asked that any prints be lifted from the paper?

A. I didn't feel it was necessary.

Q. Now, do you agree that Mr. Dorton's car was closer to Mr. Bourjaily's car than was your van?

A. I don't know. I don't know where Mr. Dorton's vehicle was.

* * * *

INTRODUCTION OF GOVERNMENT'S EXHIBIT 1 AND 1A

[954] THE COURT: You may proceed.

MR. BAKEMAN: Your Honor, at this time counsel is reviewing the stipulation that we had agreed to at an earlier date dealing with the chain of custody and the lab analysis of the cocaine.

While they are doing that (pause), your Honor, at this time the Government would move to introduce [955] Government's Exhibit 1 and 1-A. In particular 1-A are the tapes of the Denny's Restaurant and 1-B is the transcript of the tapes from Denny's Restaurant on May 12, 1984.

THE COURT: Any objection?

MR. WILLIS: I have my same objections, your Honor, certainly that I have maintained throughout the Government's evidentiary presentation, and my 104 objections to all of these exhibits involving conversations with Mr. Lonardo and the like.

Certainly there has been no showing, and that would be the subject of my motion under Rule 29 when we arrive at that point. But I think even at this point I have to maintain my position in objecting to these exhibits on the basis of previous objections.

THE COURT: Do you wish to be heard on that?
MR. BAKEMAN: We have no further argument.

* * * *

[973] THE COURT: Very good.

MR. WILLIS: —it contends that there was a conspiracy in existence between Mr. Bourjaily and Mr. Lonardo, and that by virtue of the existence of that conspiracy, all of the acts and statements made by either of the members of the conspiracy would be admissible against the other. That's under 801(d)(2)(E) as I believe the co-conspirator hearsay—exception to the hearsay rule.

There are certain critical aspects of that which are importatnt. No, 1, before these statements and acts can be deemed admissible against a particular party, he must first be shown to have been a member of the conspiracy and the statement must have been made in furtherance of the goals of the conspiracy. And that raises in this case very, very serious problems.

No. 1, do we have a conspiracy? If I understand the ultimate impact of Mr. Greathouse's testimony, what was being discussed between Mr. Lonardo and Mr. Greathouse was the prospect apparently of the two of them selling drugs to some people. I get the idea that Greathouse tried to—that the Government is theorizing that there was some kind of an association between Greathouse and Lonardo with reference to this kilogram of cocaine that [974] wasn't strictly an instance of buyer and seller.

That is a very befuddling situation for counsel. Also in the course of the conversations between Greathouse and Mr. Lonardo from the tapes, there is a point reached where Greathouse is made aware that in the light of some statement from Peggy, there was some confusion and the people that apparently Mr. Lonardo was going to pass these drugs onto, that they were no longer interested and that they would have to be recontacted.

There is no evidence that Mr. Bourjaily was one of these "potential buyers" of the contraband. And we do have, according to the Government's evidence, which the Court I deem would tend to accept for purposes of this motion as being a fact, we have the testimony by Mr. Greathouse that there was another party on the phone and we have supposedly confirmation from Mr. Dorton that he heard a second voice on the phone.

The question then becomes given the lack of an identification of this second party—and Greathouse was quite specific he didn't know who it was and there is no evidence that tends in anyway to connect Mr. Bourjaily up to that voice. Indeed what little identification data we have is in the evidence and it comes from Mr. Fiatal and that is that it was reported to him by Greathouse that the other man appeared to be 40 to 50 years of age.

[975] Now, we also have some left-handed confirmation from Mr. Dorton that he read Fiatal's, what he called a 302, but in reality his raw notes. And what he was interested in was seeing whether or not it included the segments that he heard, which would be the voice. And if he had an opinion that the speaker was not 30—I'm sorry—40 to 50 years of age, then we can assume that he would have said, "Well, he didn't sound to be that old for me."

And we have no indications there, so therefore I think that the Government is stuck, assuming there was a second voice, with the idea that the man's age is placed between 40 and 50, and this is being made by 15 year FBI agent college graduate with the considerable experience in the field of investigations.

So that we have some serious questions as to whether or not that speaker is in fact Mr. Bourjaily. Now, admittedly the prosecutor tried to smuggle it into his objections, the idea for which I'm grateful because we can resolve that now. He suggested in one of his responses that the evidence was that Mr. Bourjaily was on the premises of the Hilton Hotel when all of the calls were

made. And there is just no evidence in the record to support that thesis, and I certainly don't think that he ought to be privileged to make that argument.

[976] And I was impressed by his statement that there was circumstantial evidence to prove that such was the case. And of course there is no circumstantial evidence to prove that. The only evidence, the only way you can come to that is that you have to further conclude that he was the speaker, and that is—or in those phone calls that second voice on the phone, and I have very, very serious problems with that assessment of the evidence.

And I think that the prosecutor in fact ought to be enjoined from making any such argument that at all times Mr. Bourjaily was on the premises of the hotel. I don't think that he ought to be allowed to make that type of an argument because there is a lack of evidential support for it.

Now, the question then is assume just for the moment that that speaker was Mr. Bourjaily. Can you use a hearsay statement to make one a member of a conspiracy, or must there be evidence apart from the hearsay declaration that you want admitted against a particular defendant that proves that he is a conspirator.

I don't think that statement can serve double duty. Now, the statement is that "A friend will be with me." Now, I think it's interesting that the original reference to a friend was a gentleman friend which was quite specific. And the second reference was a friend, and I [977] think that that leaves open the possibility that it could have been a woman or it could have been another friend who wasn't a gentleman, and there are all kinds of sophisticated arguments you can make around that theme.

But nonetheless, I don't think that that statement can serve double duty, that is to say it can serve to prove the existence of the conspiracy and also prove Bourjaily's membership at that rate.

But to go even further, we have to deal with another aspect. Let's assume that that is a part that the statement can serve double duty to prove the existence of a conspiracy, No. 1, then that would be the earlier point at which Mr. Bourjaily could be deemed to have been a member. Then you have to ask yourself who are the members of the conspiracy, would that make the evidence that happened before that admissible against Bourjaily on the assumption that he was privy to the previous conversations and that he was a member, much a part of the group of potential buyers who were told that the price was confused and who were apparently—who had apparently lost all interest?

Does that make all of that evidence admissible against him? Is that in furtherance of the conspiracy, assuming one exists, between Lonardo and Bourjaily as of that moment? I don't think so. I don't think that the [978] evidence would be admissible even under that posture of the case.

My concerns are even greater. When we think in terms of whether or not there were any conspiracies here, we know from the progenous position that the Government has taken at least insofar as Bourjaily is concerned, that there was some progress position, at least I heard Mr. Bakeman make that observation, and under his suggestion that there was evidence of that somewhere.

If they were the conspirators, then there is a good question as to whether or not Mr. Bourjaily was a member of that conspiracy.

On the other hand, let's suppose that Mr. Bourjaily was purchasing some drugs from a "combination" of Lonardo and Greathouse, and you recall in one of my answers one of his—one of my questions I asked him about money and he tried to suggest that he had partners.

We know that as between a buyer and seller in the absence of some evidence of a continuing course of conduct, such as not a conspiratorial arrangement because there is no meeting of the minds except to the extent that the buyer is interested in purchasing and the seller is interested in selling their interests, are not conspiring insofar as that one transaction is concerned.

And certainly if there is an arrangement or there [979] is a prior course of dealings where A constantly sells to B over a period of time, there is a conspiracy to the extent that A will buy from B, and B will buy from A, and A will sell to C and it becomes a conspiracy in that context.

But where there is an isolated act, and that's all we have here, how do we know that the $2,000 assuming Mr. Bourjaily was interested in purchasing drugs, was not the portion he was going to contribute to a purchase by—you know, to buy a segment of in gross amount of two pounds of cocaine that apparently was being sold?

And how do we know that his relationship was not—how do we know that he was privy to what was going to happen to the balance of this contraband?

So that, your Honor, I'm very concerned about the attitude that the Court is going to take.

With reference to my 104 objection, I have a Vinson, Enright problem here. I take the position that even, and I don't think a conspiracy has been shown as between Lonardo and Mr. Bourjaily to distribute cocaine as alleged in the indictment. And I don't think that the evidence is sufficient to allow the admission of all of these other hearsay declarations against Mr. Bourjaily.

And for that reason, your Honor, I feel that they ought to be excluded and the Court ought to rule that [980] there is no conspiracy between Bourjaily and Mr. Lonardo, and ought to eliminate that, all of this other evidence that I am constantly maintaining an objection against, ought to eliminate that from Mr. Bourjaily's case.

Now, whether or not he was in possession, that of course is another matter and of course that's another charge. And I think it's critical, your Honor, that the fact that the indictment charges the use of the telephone as against Mr. Lonardo, and those charges are not made against Mr. Bourjaily, and I think the Court has to factor that into its analysis because all the Government

had to do was to convince the jury that there was probable cause to believe that Mr. Bourjaily was that speaker. And then they could have indicted him on that telephone call, the two of them that supposedly went to the lobby of the Hilton Hotel.

So what they are saying in one breath is that there was not probable cause to believe that he was the speaker, but yet they would say that that same evidence is sufficient, is clear and convincing proof of the existence of the conspiracy. I think probably ask a lesser standard than clear and convincing which is the standard as I understand it that the Court has to measure the Vinson, Enright problem and the quantum of evidence relevant to a particular defendant when he raises a motion comparable to [981] the one I am putting before the Court.

Thank you.

* * * *

[983] THE COURT: Mr. Bakeman.

MR. BAKEMAN: Your Honor, before I get to my comments about whether or not we have established a conspiracy, I would just like to respond to a couple comments made by defense counsel.

First, and probably the only point I will agree with Mr. DeVan is that Mr. Greathouse was not a co-conspirator, he could not legally be a co-conspirator because he was in fact a Government agent. And I would further state that he was not one of the known or unknown co-conspirators.

Regarding Mr. Willis's comments about the phone counts, I would indicate to you that the phone counts correspond to taped conversations; not to the untaped conversation. So that fact that he was not charged would have no bearing on this Court's decision.

Mr. Willis also tried to indicate that in the first [984] phone conversation on May 25th, that he referred to the friend as a gentleman. And the second conversation he just said, "My friend."

Well, if you read the—as the Court will—the entire conversation Lonardo said, "My friend will be out in his car." So obviously we are talking in a singular and we are talking about in the masculine gender throughout the entire course of events on May 25, 1984.

Regarding whether or not the Government has proven by the preponderance of the evidence the existence of the conspiracy, I'll draw the Court's attention primarily to the conversation had on May—or excuse me—May 12, 1984. And it's interesting to note that their case captioned United States versus Tamargo, last name spelled T-A-M-A-R-G-O, cited 672 Fed. 2d, page 887, it's an Eleventh Circuit case, 1982, wherein the facts in that case were remarkably similar to this particular case and the conspiracy count.

The Government's position is that the outline of how the conspiracy was to develop during the course of events between May 12th and May 25th were outlined by Lonardo when Lonardo said, "But this coming week I will try to contact some people. See, they don't know who I'm talking to. I don't want them to know."

So from the very beginning, Lonardo has indicated [985] by his conversation that was recorded that the conspiracy would exist, that he would be contacting at least one other person, whether it be two, three or four.

Lonardo then went on to say, "The way we will do it is the way we did it with the one fellow." Greathouse describing the incident on the tape said, "I'm not going into offices. I'll go here and I'll drop this to 'em and then they can walk it to the office they want to. I'm not sitting in an office like before." Lonardo then said, "I'll tell you where to drop it." Greathouse said, "Okay."

So the parameters of how the delivery was to take place as part of the agreement was also outlined initially. Greathouse said, "I want half up front. We can sell it for 30." So there is an agreement as to cost.

Greathouse wants his money half up front and they are agreeing to sell the cocaine for $30,000. To show

that Lonardo did fulfill his part of the conspiracy, that it was existing, on May 24th he indicated that he would have to recontact the people, like he said on the 12th, "I will contact people." He confirmed that he did in fact contact people by his statement on the 24th when he said, "I will have to recontact some people."

Lonardo further said on the 24th that the delivery would take place someplace other than the Sheraton hotel. [986] On the 25th we have the conversation, "I have a gentleman friend of mine here now and he has some questions to ask you about the trees."

So independent of what that third, second phone conversation indicated, and outside the credibility of Clarence Greathouse, we have Lonardo saying that he had a gentleman friend here and he wants to talk about cocaine. The third conversation Lonardo said, "I'll be in the lobby, you can bring in the key, the car key, and my friend will be out in his car and I'll just go over and, you know." And we can infer from that that the delivery was to take place in that fashion.

The Federal Court of Appeals for the Eleventh Circuit in a similar case, Tamargo, basically there was a series of phone calls monitored by the Federal Government. The individual said, "I have a supplier," and the Government agent indicated one of the phone calls he heard a second individual in the background, again was not able to identify the voice.

Then at the time the delivery took place there was in fact a second individual. He was arrested and charged with a conspiracy. And in response to Mr. Willis's argument that, hey, there may have been a conspiracy but my person wasn't involved in it back on May 12th, May 13th, May 14th or whatever day it may be, the Court of [987] Appeals faced a similar argument in Tamargo and said, "He may be found guilty of a conspiracy even if he did not join the conspiracy until after its inception."

And the Government's position in this case, at the very least that Bourjaily joined the conspiracy as of May

25th, 1984, and therefore is responsible for all the acts in that conspiracy.

I further indicate to you that even though Willis wants to enjoin me from making the argument that Bourjaily was at the Hilton Inn on May 25th, I think that nevertheless there is circumstantial evidence that he was there from as early as approximately 5:00 o'clock because the evidence goes to show that the phone calls that were made by Lonardo on the 25th, one at 5:00 something and one at 7:00 something I believe, that the phone number that was placed in the beeper of Greathouse and the number that Greathouse called back was a pay phone in the lobby of the Hilton Inn.

And the evidence was, "I have a gentleman friend of mine here," in the first phone call, his friend will be in the car, will take delivery. And when we instituted the arrest on the 25th at about 8:45, 8:47 in the evening, there was in fact a gentleman friend there in the car in possession of sufficient funds to buy the kilogram of cocaine as agreed on with half up front.

[988] So I believe there is evidence independent of what Willis attributes to be hearsay statements of an existence of a conspiracy. We have met that burden of proof by the preponderance of the evidence. And the Court should therefore overrule the defendants' motion and should, as indicated on prior, introduce all the evidence to the jury as to the issues of conspiracy.

MR. WILLIS: Yes. I'd like to respond very briefly, your Honor.

Mr. Bakeman's argument I think centralizes a critical point in this case. He relies on the particular statement made by Mr. Greathouse, and I think he rightly should because it emphasizes our position.

He tells us, and he is correct, that Mr. Greathouse indicates that he wanted half up front and then he says, "We can sell it for 30,000." Now, who is the "we," I mean who is the "we"? Isn't he telling—isn't he saying

that he and Lonardo can sell it for $30,000? And that they should get half up front?

Now, if that is the thrust, if that is in fact what is meant by that statement, "We can sell it for 30,000 and I want half up front," doesn't it sound like Greathouse and Lonardo are the sellers, and that anybody that gets any drugs from them would be buyers?

And this points up my single act argument which is [989] that there is no, in the absence of any prior dealings, that there is no conspiracy or understanding as to prior dealings, that there is no conspiracy as between a buyer and a seller. That they have two separate interests; one, the buyer is interested in selling, and the purchaser is interested in buying. There is no meeting of the minds. They do not have any community interest. Their interests are different.

And I think that emphasizes, your Honor, our position here that there was no conspiracy as between Mr. Lonardo and Mr. Bourjaily. Certainly if that is the case, then all of this other evidence ought not to have been admitted against Mr. Bourjaily.

THE COURT: Anything further?

MR. DeVAN: Nothing further, your Honor.

THE COURT: All right. The Court finds from the evidence that's been put on by the Government, at the end of the Government's case, that the Government has proven by a preponderance of the evidence that a conspiracy did exist, that the defendants were members of the conspiracy, and that the hearsay statements were made in the course and furtherance of the conspiracy.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

(Title Omitted in Printing)

EXHIBITS 1C, 3B, 5B, 7B, 9B, 10B, 12B & 13B
(TRANSCRIPTS OF
TAPE RECORDED CONVERSATIONS)

GOVERNMENT EXHIBIT 1 C

FEDERAL BUREAU OF INVESTIGATION

(1) Date of transcription 5/21/84

Attached is a transcript of a recording of a conversation between Clarence Greathouse and Angelo J. Lonardo on May 12, 1984.

Investigation on 5/12/84 at Cleveland, Ohio File #CV 245A-58-47I by SA ROBERT A. FIATAL/rl Date dictated 5/17/84

CV245A58 5/12/84

Clarence Greathouse, Jerome Greathouse, Angelo J. Lonardo

C. GREATHOUSE: Uh the only thing uh . . .

(pause)

SA FIATAL: Take a look (unintelligible)

C. GREATHOUSE: I'm tell you what this, this son of a bitch is a lot bigger than I expected it.

SA CONNOLE: It's a lot bigger than I expected too. It's running.

MALE: Yeah I can see it running . . . it's running. I guess we'll have our fun.

MALE: Okay.

SA FIATAL: Okay (unintelligible). Uh, this is Special Agent Robert A. Fiatal with Special Agent Herbert Cohrs uh Bob Connole with the FBI, and Gary Rasoletti of the IRS, the date is 5/12/84. The time is approximately uh 1:18 p.m. Uh the individual wearing this body recorder is uh Clarence Greathouse and with the intent to record conversation with Angelo J. Lonardo.

C. GREATHOUSE: Now how do you know it works.

(laughter)

C. GREATHOUSE: Oh they gotta get a kick out of all my crazy ass laughs too.

(laughter)

C. GREATHOUSE: Whose got my key . . . you guys now I'm gonna come back here and make mad love tonight. . .

(laughter)

MALE: (unintelligible)

MALE: Huh?

SA CONNOLE: You got (unintelligible) I handed it back to you.

C. GREATHOUSE: If I've got it my mamma's the pope. See?

MALE: (Unintelligible).

C. GREATHOUSE: If there is any changes I hope you're able to pick it up on your radio. . .

SA CONNOLE: We can't pick it up (unintelligible) on that.

C. GREATHOUSE: Out here. Out there.

SA CONNOLE: (Unintelligible) call us.

C. GREATHOUSE: Hey where you parked?

SA CONNOLE: I'm parked out front (unintelligible) Well we'll walk out this way.

C. GREATHOUSE: We want to see if . . . the van out there right. . .

SA CONNOLE: Uh uh.

C. GREATHOUSE: So they'll be able to hear the conversation right.

SA CONNOLE: No (unintelligble) This is just a recorder, not a transmitter.

(unintelligble conversation)

(static)

C. GREATHOUSE: Oh, o'kay . . . Let me see I tell you one thing you're gonna have to get more sophisticated than this. Hm. . .

(unintelligible conversation)

C. GREATHOUSE: You've got it. . .

(STATIC)

(pause)

SA CONNOLE: (unintelligible) two eighty five today.

C. GREATHOUSE: Oh yeah.

SA CONNOLE: I'm gonna go right now.

C. GREATHOUSE: Beautiful.

SA CONNOLE: Yeah. . . I'll let you know when I get back (unintelligible).

C. GREATHOUSE: Let me see. I may not have a ride here (whistles).

(Music)

(Background Sounds)

C. GREATHOUSE: Hey, did you get ahold of him? Did you tell him I was around 150th by Laurel's Restaurant?

C. GREATHOUSE: He's not here. Oh, okay. 3:30 I will be . . . I have to come home and drop him off, o'kay . . . and then I'll be . . . as soon as I leave here. I'm going straight to where I'm supposed to be. Okay yeah bye.

(pause)

(Unintelligible background conversation)

MALE: (Unintelligible).

(Static—rustling sounds)

(Background music)

MALE: (Unintelligible) I know I know. . .

(Tapping Sound)

C. GREATHOUSE: Hi . . . page him again because I just paged him and I'm not getting an answer cuz time's running out on me here. Cuz I only got a half hour to reach my destination. All right bye.

(music in background)

MALE: Yeah.

(Background noise)

SA CONNOLE: O'kay.

C. GREATHOUSE: I called him 30 minutes ago and he's not here yet . . . here . . . come here I don't have my glasses and I can't see this damn number. Uh I called his wife up there . . . what's that number on there.

SA CONNOLE: 251-9755.

MALE: Can he receive any calls on this. No incoming messages o'kay.

SA CONNOLE: Hmm . . . I didn't know this?

C. GREATHOUSE: See I don't have my glasses. See some of em are marked no incoming messages you know.

C. GREATHOUSE: But I called his wife and told her to page him.

SA CONNOLE: (unintelligible) I would have figured he would stay in the area.

C. GREATHOUSE: Well he didn't know I was coming yet.

SA CONNOLE: Oh. . .

C. GREATHOUSE: See I had to page to tell him where to get me. Don't worry.

SA CONNOLE: Yeah.

C. GREATHOUSE: We'll get him . . . hi doll has he answered any of your calls yet, huh? He hasn't answered any of your calls . . . does he know it's by the County Inn . . . did you tell him by the Country Inn . . . oh shit . . . hmmm.

SA CONNOLE: This might be him coming.

C. GREATHOUSE: Oh wait a minute . . . wait oh I see the bomb coming now . . . yeah . . . okay bye bye, yeah.

SA CONNOLE: Okay brother good luck.

C. GREATHOUSE: Hey man you know me.

SA CONNOLE: I know I gotta take care of you though (unintelligible). Give you some Irish luck.

(laughter)

C. GREATHOUSE: Hey wait a minute. Let me tip toe (unintelligible) hey you ain't getting off that easy . . . where's my receipt?

SA CONNOLE: Oh yeah we gotta . . . yeah hold on to that.

C. GREATHOUSE: No I'm gonna give it to you.

SA CONNOLE: Oh all right.

C. GREATHOUSE: If I can find it.

SA CONNOLE: Oh give it to me when we come back. . . Give it to him.

C. GREATHOUSE: Okay.

SA CONNOLE: Give it to Cohrs, or what's-his-name.

C. GREATHOUSE: Which one.

SA CONNOLE: Uh the little guy with the glasses.

C. GREATHOUSE: Yeah he seems . . . he's a serious little sucker.

SA CONNOLE: Yeah, yeah he's a lawyer give it to him . . . say here. . .

C. GREATHOUSE: He's a lawyer.

SA CONNOLE: Yeah.

C. GREATHOUSE: That's all right I'll blow his mind . . . cause he's cool. Where's my bomb at?

SA CONNOLE: (unintelligible)

C. GREATHOUSE: Over there he is.

SA CONNOLE: That fucking thing is nice (unintelligible).

C. GREATHOUSE: Oh I'll have to . . . I'll sell that before.

SA CONNOLE: Well at least Roselleti ain't gonna take it cuz uh. . .

C. GREATHOUSE: No, if they keep on taking.

They can forget it.

SA CONNOLE: I think that's it . . . he's not going to do any more. Is it. Well we told him . . . we says hey look the guy's down we ain't putting the boots to him . . . I said you know he'll bail out of this fucking thing if that Roselleti is a decent guy.

C. GREATHOUSE: I'll go out of it. . . I'll quit it tomorrow.

SA CONNOLE: Yeah . . . go ahead . . . I'll talk to you about three, three thirty.

C. GREATHOUSE: I got you covered. (Unintelligible) I'm gonna drive my bomb. (static)

C. GREATHOUSE: (groans) Okay boss you know where.

(music in background)

C. GREATHOUSE: Know what I mean. I'll have to drop you off I'm coming back, uh where's my other room at oh route 42 and turn right down past the Coach House.

J. GREATHOUSE: Yeah.

C. GREATHOUSE: You got past that second red light or no?

J. GREATHOUSE: No it's, well I'm not sure it's about a mile, mile and a half down there on the left.

C. GREATHOUSE: and then past Howard Johnson's. What's the name of the place.

J. GREATHOUSE: Murphy's.

C. GREATHOUSE: Murphy's. Okay.

C. GREATHOUSE: No problem, let's see the best way to go is, go over here and get off at 130th.

J. GREATHOUSE: Yeah.
C. GREATHOUSE: And go down Memphis.
J. GREATHOUSE: Memphis?
C. GREATHOUSE: Yeah.
C. GREATHOUSE: Shoot. Go straight down Memphis to uh Broadview. Okay. (pause—music in background) Where you going?
C. GREATHOUSE: Oh that way, yeah. What the hell am I thinking about. Like I was coming over here because we had to uh find a vacant parking lot you know to put this thing on. I didn't want to do it there on Denison because too many people know me.
J. GREATHOUSE: I don't know what the hell you're talking about.
C. GREATHOUSE: Well this thing that I put in my pocket, my cigarettes.
J. GREATHOUSE: Oh.
C. GREATHOUSE: I just come over for a short talk that's all. I don't ever want you to know nothing. You don't know you can't tell. (pause)

(music in background)

J. GREATHOUSE: (Unintelligible)
C. GREATHOUSE: Yeah go on Bellaire, West 117th, no let's see down Bellaire.

(music in background)

J. GREATHOUSE: (Unintelligible)
C. GREATHOUSE: Turn right. Just go straight through now to uh, to Ridge Road. I mean to uh . . .
J. GREATHOUSE: Snow.
C. GREATHOUSE: No.
J. GREATHOUSE: Broadview.
C. GREATHOUSE: To Broadview and up Broadview. I wanted to get there before he gets there. I want to see who's coming in with him.
J. GREATHOUSE: Yeah.

C. GREATHOUSE: I don't completely trust him you know. That's the reason I keep you sitting in the car. In case there's any yoyos with him.
J. GREATHOUSE: Flea market.
C. GREATHOUSE: Yeah, they have a great flea market here. When you gonna see Jim on that stuff?
J. GREATHOUSE: I don't know yet.
C. GREATHOUSE: Let's see him and see what his game plan is okay? And then I'll take it from there. I'll come in the picture after a couple of trans ah . . . couple of small things.
They got some pretty hanging baskets there.
J. GREATHOUSE: Did you page mama?
C. GREATHOUSE: Uh hm. Who?
J. GREATHOUSE: My old lady.
C. GREATHOUSE: I called her.
J. GREATHOUSE: Two times. A second time . . .
C. GREATHOUSE: Yeah but I couldn't uh they couldn't . . . I couldn't receive a call where I was at. I didn't.
J. GREATHOUSE: I know.
C. GREATHOUSE: I forgot my glasses. I forgot my glasses and then I had to take another friend of mine in there to read the telephone and I, I can't see (laughs) I mean put it over against that building I can read it. See when I dial a phone number my eyes are so bad sometimes when I dial a phone number, what I do is I I'm like a blind man I feel three, one . . . two, three, six, nine then zero. That's the way I dial my phone numbers. It's like a teletype thing you know. But I can see good over there. (Unintelligible) Two . . . eleven p.m. I can see anything as long as it's over there in that parking lot. But you put it up here I couldn't see it if the print was that big. I guess that comes with age huh? (laughter) and too much good pussy.
J. GREATHOUSE: (Unintelligible).

C. GREATHOUSE: That's what my old lady . . . she asked me this morning, she said, want to make love. I said you got any money?

(laughter)

J. GREATHOUSE: I don't know about age but as wild as you was last night, ready to kick everybody's ass.

C. GREATHOUSE: Watch that. You watching . . . you mess my car up Jack and you, I'll hang you.

(Radio in background)

C. GREATHOUSE: I will literally hang you if you put a scratch on this thing That kid get that kid to polish it tomorrow.

J. GREATHOUSE: (Unintelligible) he's gone.

C. GREATHOUSE: Huh?

J. GREATHOUSE: He's gone. Frank left.

C. GREATHOUSE: No not Frank, that big tall kid.

J. GREATHOUSE: Oh.

C. GREATHOUSE: What's his name.

J. GREATHOUSE: Keith.

C. GREATHOUSE: Keith.

He said he'd just polish the other one for fifteen dollars. I should polish it.

J. GREATHOUSE: Well we could stop right now and have it washed.

C. GREATHOUSE: No, we ain't got the time to. Let's go. In fact, keep on fucking around and I'll get behind the wheel and we'll get us a couple of tickets on the way. Not you . . . me.

(laughter)

MALE: (unintelligible)

J. GREATHOUSE: Shit man I'd have been better off to come up 71.

C. GREATHOUSE: Oh, no uh uh . . . we're almost down to Broadview now. I always like to get there before he gets there. I always like to see if there's any cars following him. That's your job.

J. GREATHOUSE: If I'd come up 71 I could have done a hundred or a hundred and ten.

C. GREATHOUSE: Yeah like I said I want to get there and I want to park in a position to where you can see all three . . . all three drivelanes. and if there's any cars following him, I'm gonna park it where I can see you, and if there's any cars following him you give me a high sign. You know put . . . throw your hand up or something, just throw your hand up and I'll be watching you. Okay?

J. GREATHOUSE: Yeah.

C. GREATHOUSE: There's three, three, three drivelanes coming into that place.

J. GREATHOUSE: Huh?

C. GREATHOUSE: There's three drivelanes coming into that place. I hope they bring little Sammy over there. I want to talk to that little . . .

J. GREATHOUSE: Hmmm.

C. GREATHOUSE: I didn't know there was a library there. I'm gonna let uh George Hudak live in that house. Free rent and then he'll pay me later, you know. George ain't never had a decent place to live.

J. GREATHOUSE: No that's for sure.

C. GREATHOUSE: You know. Nothing decent, no bathrooms . . . no nothing. So, I'm gonna let him live in that house.

(Radio in background)

J. GREATHOUSE: I tell you I'd have been better to come up '71 to 25th.

C. GREATHOUSE: Don't worry about it. This is 25th see this is a busy street. Plus the fact I needed to talk to you before we got there. See you would have got there too fast.

(laughter)

C. GREATHOUSE: Oh its a beautiful day (unintelligible) huh?

J. GREATHOUSE: Yeah.

C. GREATHOUSE: Hmmm pretty . . . I'm going out and be with her for the balance of the evening. Get somebody young.

J. GREATHOUSE: Thank you.

C. GREATHOUSE: Huh?

J. GREATHOUSE: I said thank you now I have to think of a cover for you so . . .

C. GREATHOUSE: Oh don't worry about that I'll give you a cover. Let me get rid of my phone books for now. Yeah don't need this extra pack of cigarettes right now. Anything else I don't need . . . remind me to get back out of there, okay?

J. GREATHOUSE: Okay.

C. GREATHOUSE: John, John Turocy. Did you get a hold of Cindy? What about Tammy. We need to be touching base with them.

J. GREATHOUSE: Uhh I don't really care too much about calling Cindy.

C. GREATHOUSE: I'll talk to um . . . I'll do the talking . . . find out when you can set me up a meeting, okay? Don't talk to nobody, just set my meetings up.

J. GREATHOUSE: You want me to set meetings up?

C. GREATHOUSE: That's all . . .

J. GREATHOUSE: With Cindy and Tammy.

C. GREATHOUSE: With Cindy, well one of em at a time. I don't want both of them there.

J. GREATHOUSE: Alright.

C. GREATHOUSE: I want my meeting set up with Eric McDonald too.

J. GREATHOUSE: No problem.

C. GREATHOUSE: That's all you got to do is just set up meetings I want to go see Tommy Towner. Okay?

J. GREATHOUSE: You want to see him too.

C. GREATHOUSE: Damn right I want to see him.

J. GREATHOUSE: All right.

C. GREATHOUSE: It's time I talked to these people, they listen to me when I talk to them. Uh, okay. Uh, okay, just about forgot something . . . let me put my billfold in the glove compartment too but I ain't been carrying my billfold when I been seeing him. (sighs) (sings along with radio). What's that a Mercedes?

J. GREATHOUSE: Huh?

C. GREATHOUSE: Mercedes. (singing with radio) Oh, that's a beauty (unintelligible). It's right at the top of this hill . . . yeah . . . right at the top of this hill and turn right . . . Let's see . . . park in front of the window right there, okay.

J. GREATHOUSE: All right.

C. GREATHOUSE: Yeah back it in . . . uh let's see you can sit here. Park right here . . . cuz I'm gonna try to sit on that corner over there? Okay.

J. GREATHOUSE: Yep.

C. GREATHOUSE: It's ten till two, I'm gonna in and order some soup.

J. GREATHOUSE: I can't see a damn thing for the tractor.

C. GREATHOUSE: Well if he's what what truck?

J. GREATHOUSE: That truck right there.

C. GREATHOUSE: Well sit over there then.

J. GREATHOUSE: Alright.

C. GREATHOUSE: Okay you want to, well if he's not here yet come in and have some soup with me until he arrives and then you can leave.

J. GREATHOUSE: Okay.

(door slams—banging noises—enters restaurant)

(background conversation)

C. GREATHOUSE: Hi, where's uh, your smoking and non smoking, smoking I want.

FEMALE: Not smoking (unintelligible) that's non-smoking.

C. GREATHOUSE: Okay, is it okay, to sit here.

FEMALE: Sure.

C. GREATHOUSE: I'm expecting some more people.

FEMALE: Okay.

C. GREATHOUSE: Okay thank you. Let me grab one of 'em now, bring me some soup.

(background noises)

C. GREATHOUSE: Hello boss. Oh, it's good to see you. It's been a little while.

LONARDO: Yeah.

C. GREATHOUSE: I've been getting plenty of rest though.

LONARDO: Huh?

C. GREATHOUSE: I've been getting plenty of rest. Oh, okay honey.

WAITRESS: Coffee here.

LONARDO: Give me some, you got some kind of diet pop.

WAITRESS: Yeah, uh hm. Diet Coke.

LONARDO: Whatever.

C. GREATHOUSE: I'll have coke and a cup of soup, little bit hungry.

WAITRESS: I'll be right back.

C. GREATHOUSE: Okay. Mama had to go out to the campground today so . . .

LONARDO: Where.

C. GREATHOUSE: Out there.

LONARDO: The country?

C. GREATHOUSE: Yeah, she gonna check on some stuff cuz I'm not allowed out of the county.

LONARDO: Uh huh.

C. GREATHOUSE: So she's taking care of everything for me.

LONARDO: Good.

C. GREATHOUSE: Trying to anyway.

LONARDO: Did any of the guys come in town?

C. GREATHOUSE: No, no uh this week Wednesday.

LONARDO: Talked to the people.

C. GREATHOUSE: Yeah what they say?

LONARDO: Well they're interested.

C. GREATHOUSE: Okay, do they want to wait till it's here.

LONARDO: Huh?

C. GREATHOUSE: Do they want to wait till it's here.

LONARDO: Oh yeah. How else could we do it.

C. GREATHOUSE: They don't want to put nothing up front?

LONARDO: Huh?

C. GREATHOUSE: They don't want to put nothing up front?

LONARDO: The way we'll do it . . . is the way we did with the one fellow . . . (to waitress) take it (unintelligible)

C. GREATHOUSE: Oh okay.

LONARDO: That's okay.

C. GREATHOUSE: Okay.

LONARDO: Right there.

C. GREATHOUSE: Okay.

LONARDO: What do you think?

C. GREATHOUSE: Okay.

WAITRESS: That's a Diet Coke and what did you want sir?

C. GREATHOUSE: A Coke please.

WAITRESS: Coke also, regular or diet?

C. GREATHOUSE: Regular.

LONARDO: I'll have a diet myself.

C. GREATHOUSE: He needs a diet.

(laughs)

LONARDO: I do I've gained twenty pounds.

C. GREATHOUSE: Have you really?

LONARDO: Yeah.

LONARDO: Yeah. Ain't been doing nothing. All I do is go to P.M. every night and eat.

C. GREATHOUSE: You look a lot beter than the last time.

LONARDO: Yeah well I feel better I just I was at the Clinic all week.

C. GREATHOUSE: You move with your girl?

LONARDO: Huh?

C. GREATHOUSE: You move in with your girl yet?

LONARDO: No, no.

C. GREATHOUSE: No?

LONARDO: I don't know if I want to.

C. GREATHOUSE: Oh, okay.

LONARDO: Huh? You know I gotta make up my mind anyway I was at the Clinic all week that's why you haven't heard from me.

C. GREATHOUSE: What uh?

LONARDO: Well it wouldn't have done any good anyway.

(Unintelligible conversation)

LONARDO: (Unintelligible) tests.

C. GREATHOUSE: Oh, okay. You was there for a week.

LONARDO: Well out patient.

C. GREATHOUSE: You go thee all day long. How is it going?

LONARDO: So far the cancer hasn't gotten any worse and they're amazed . . . they really are.

C. GREATHOUSE: Yeah . . . okay . . . well so am I.

LONARDO: I hope they stay amazed.

C. GREATHOUSE: Yeah.

LONARDO: They cut a mole off of my back. I don't know if I told you that.

C. GREATHOUSE: Yeah you was telling me about that.

LONARDO: But uh now they took some more blood tests . . . then they tested my kidneys and everything that's o'kay. So I've been getting some good reports you know.

C. GREATHOUSE: Yeah.

LONARDO: (unintelligible) could change anyday but . . . .

C. GREATHOUSE: I hope it don't

LONARDO: (untintelligible) all we can do is treat it you know they treat it with some kind of medicine. I don't know what.

C. GREATHOUSE: That's about as sloppy as you can do . . . half the soup is in my saucer.

LONARDO: Yeah see and what they're doing is trying to keep me away from chemotherapy see.

C. GREATHOUSE: Hmm . . . I need a valium.

LONARDO: See because they said that's not a pleasant thing.

C. GREATHOUSE: Yeah.

LONARDO: So what the hell I'm going to the best there is anywhere in the world.

C. GREATHOUSE: Yeah.

LONARDO: The Clinic is

C. GREATHOUSE: Yeah the Clinic it is.

LONARDO: So I feel good about it.

C. GREATHOUSE: I was out last night and had some beers. I tangled with a guy about 380 pounds. About 380 pounds, I smacked him last night, oh my God. Gonna get killed.

LONARDO: You better watch who you smacking.

C. GREATHOUSE: I know.

LONARDO: That's two people.

C. GREATHOUSE: This guy looked like four. He looked like uh big Ron. That's what he looked like, I said oh my God what have I done.

LONARDO: No I tried I (unintelligible) grabbed ahold of him.

C. GREATHOUSE: Oh did you get ahoid of him?

LONARDO: Miller.

C. GREATHOUSE: Okay.

LONARDO: And as a matter of fact he's breaking away from that other asshole.

C. GREATHOUSE: Okay.

LONARDO: See cuz that's the one, I'm only telling you this.
C. GREATHOUSE: Okay.
LONARDO: That's the one that talked him into going along with him.
C. GREATHOUSE: Who Sam?
LONARDO: You know yeah, cuz Miller's a good kid.
C. GREATHOUSE: Yeah, I know he is.
LONAROD: The other one's a real, a real asshole.
C. GREATHOUSE: Well that's the one I want. If you can get me his phone number.
LONARDO: I've sent for him four times.
C. GREATHOUSE: Yeah.
LONARDO: And he hasn't called.
C. GREATHOUSE: You get me his phone number.
LONARDO: See I even went to his wedding. He had the balls to invite me but to make everybody in town.
C. GREATHOUSE: Oh that one, okay.
LONARDO: To make everybody in town feel as though (unintelligible) okay.
C. GREATHOUSE: Yeah.
LONARDO: I went.
C. GREATHOUSE: Yeah.
LONARDO: I didn't stay but, I stayed.
C. GREATHOUSE: Yeah, yeah.
LONARDO: An hour and then I left.
C. GREATHOUSE: To send some messages.
LONARDO: This way you know somebody hey geez we're friends.
C. GREATHOUSE: Yeah.
LONARDO: He could never be my friend never.
C. GREATHOUSE: Mine either. What about the other little skinny one?
LONARDO: Huh?
C. GREATHOUSE: Sam, Sammy.
LONARDO: He's all right.
C. GREATHOUSE: Is he.

LONARDO: Yeah.
C. GREATHOUSE: Well how come he owes me so much money?
LONARDO: As a matter of fact and you know I believe this kid. He never got what he was supposed to get either.
C. GREATHOUSE: You're kidding?
LONARDO: He got fucked.
C. GREATHOUSE: And I got fucked.
LONARDO: Well three of us, alright, two of us, mostly because you know Sammy didn't put anything up.
C. GREATHOUSE: Is he saying he's not gonna give us our money?
LONARDO: That's that's right.
C. GREATHOUSE: Well it ain't right either.
LONARDO: No, no, no, it ain't right that's what I'm saying is right but you're right.
WAITRESS: (unintelligible)
C. GREATHOUSE: (Unintelligible)
LONARDO: We will work this deal . . . cuz I hate his fucking guts.
C. GREATHOUSE: Give him to me.
LONARDO: See because they owe me five "O" more, what the fuck.
C. GREATHOUSE: They owe you five, six and they owe me. . .
LONARDO: They owe me seven, 20 be almost, six, "O".
C. GREATHOUSE: Six, "O", they owe me no five, 8 they owe me, see.
LONARDO: They owe me four, seven, plus that 13 five (unintelligible)
C. GREATHOUSE: That's right, that's right.
LONARDO: Add that to it.
C. GREATHOUSE: Yeah.
LONARDO: See four seven's what yeah I just forgot the 13, I mean I forgot it then but I ain't gonna forget it now. (unintelligible conversation)

C. GREATHOUSE: You want to know how much money I got and I'm God take my children's life I got $40.00

LONARDO: Well you got two to one over me I got about 20, 25.

C. GREATHOUSE: Okay. My wife went out today to try and get some money.

LONARDO: Yeah.

C. GREATHOUSE: But I got $40.00 and I got (unintelligible)

LONARDO: (unintelligible) four to five weeks to be able to touch something.

C. GREATHOUSE: We'll uh this week.

LONARDO: Yeah.

C. GREATHOUSE: Are they ready this week?

LONARDO: Who? I'm talking about you said you may, you could (unintelligible) put your hands on some cash.

C. GREATHOUSE: Yeah I will.

LONARDO: Can't get close to.

C. GREATHOUSE: I will.

LONARDO: But this coming week I'll try to set some people up.

C. GREATHOUSE: Yeah.

LONARDO: See and they don't know who I'm talking to, I don't want them to know.

C. GREATHOUSE: No, I don't want nobody to.

LONARDO: There's a bad word out uh Ronny has caused a lot of people uh that don't know me personally those that know me personally tell me tell him to get fucked.

C. GREATHOUSE: Yeah.

LONARDO: But he's put out the word.

WAITRESS: Can I get you anything else (unintelligible)

C. GREATHOUSE: Pardon?

WAITRESS: Anything else today.

C. GREATHOUSE: No that's okay honey.

LONARDO: Do you believe that.

C. GREATHOUSE: I want Ronnie.

LONARDO: So you know my people called me in (unintelligible).

C. GREATHOUSE: Yeah.

LONARDO: And told me uh what the fuck's going on I thought (unintelligible) I said I ain't doing nothing and uh what did you have to do with this guy. The guy's a friend of mine a customer comes in the bar you know (unintelligible).

C. GREATHOUSE: Yeah don't tell nobody nothing about me.

LONARDO: So I said well what's this word that this asshole's been passing around.

C. GREATHOUSE: Okay.

LONARDO: I say well you know me. You answer it. They say well we know the answer.

C. GREATHOUSE: Yeah, goddamn. Well just let me know where Ronny's at okay.

LONARDO: I gotta find out.

C. GREATHOUSE: Well you find out where he's at and then give it to me. Uh are we going to do, uh are we going to do anything with Miller anymore. Try to get our money, that's, I'm asking you.

LONARDO: If he comes up with something.

C. GREATHOUSE: He's got to come up with something before we even start.

LONARDO: No, uh let me talk to him this week.

C. GREATHOUSE: Okay we'll we'll do something with him but I want half . . . I want half up front everything I do with him.

LONARDO: Right.

C. GREATHOUSE: I want half and the rest of em I want cash okay . . . now I will roll something for Wednesday or Thursday is that too soon?

C. GREATHOUSE: I've got to make some money.

LONARDO: Well let me.

C. GREATHOUSE: Turocy all over me.
LONARDO: (Unintelligible) . . . try to set it up.
C. GREATHOUSE: Turocy all over my ass.
LONARDO: Huh?
C. GREATHOUSE: Turocy all over my ass. I've only paid them thirty five hundred dollars.
LONARDO: Uh ha.
C. GREATHOUSE: Out of fifteen thousand.
LONARDO: He shouldn't charge you fifteen, that's wrong.
C. GREATHOUSE: He charged me the whole thing.
LONARDO: He's wrong.
C. GREATHOUSE: Well he did.
LONARDO: Cuz see he pays two to three points.
C. GREATHOUSE: Yeah.
LONARDO: That's all he pays. Not over three and not less than two, I was in that business.
C. GREATHOUSE: Well then he charged me the whole thing.
LONARDO: Fine, you know uh but he had to pay forty five hundred. That's what it cost him. In other words when you give him forty five hundred he's even.
C. GREATHOUSE: Another thousand and he's even.
LONARDO: He's even.
C. GREATHOUSE: And everything else is free.
LONARDO: And everything over that is profit, so don't let him (unintelligible).
C. GREATHOUSE: I ought to go down on the (unintelligible).
LONARDO: When you, when you give him the other thousand okay, he's even.
C. GREATHOUSE: That's what I'm gonna give him then.
LONARDO: He's even.
C. GREATHOUSE: I'm gonna give him (unintelligible).
LONARDO: And tell him he's gotta wait for the rest.

C. GREATHOUSE: That's what I'm gonna do, exactly what I'm gonna do.
LONARDO: He's even, unless you want to give him another thousand profit.
C. GREATHOUSE: And if he wants, if he wants to cancel my bond, cancel it then.
LONARDO: He ain't gonna fucking cancel it. Cuz know he's even right now his only shot, he cancels the bond he get nothing if he doesn't cancel the bond now he's got a shot to get his money from you.
C. GREATHOUSE: Oh, okay.
LONARDO: He ain't that dumb is he, if he's that dumb . . .
C. GREATHOUSE: He better not be.
LONARDO: Now tell him the truth, look I understand the bond business John you're entitled to make money, you don't have to tell him where it came from.
C. GREATHOUSE: Yeah.
LONARDO: Just tell him you're entitled to make money. I know you guys pay anywhere from two to three points, okay and you're entitled to make money. I don't appreciate you charging me ten, you should have charged me maybe anywhere from five to seven. Now I'm gonna get your money where you're even plus a little profit your gonna have to wait for the rest because hey I only called you, there's other bondsman . . . there's other bondsman that will wait for their money.
C. GREATHOUSE: Yeah just like Ike Goldstein told me. He said I'll go your bond anytime and wait for it.
LONARDO: Tell tell him there's other people that told you that they'll wait for their money. If he wants to wait let him wait as long as he's even what's he got to yell about.
C. GREATHOUSE: He ain't got nothing to lose and nothing to yell about.
LONARDO: Right.
C. GREATHOUSE: That's right. Well see I didn't look at it like that, I just looked at it, I owe the man.

LONARDO: And if he knows I'm telling you that.
C. GREATHOUSE: You know, you know I pay my debts.
LONARDO: You know. Cuz I don't want him, cuz he doesn't know . . .
C. GREATHOUSE: No I don't tell him nothing about you.
LONARDO: . . . you and me anyways.
C. GREATHOUSE: No.
LONARDO: I used to work through my cousin he'll think uh that something happened through there see, but that's the truth.
C. GREATHOUSE: This soup looks like puke.
LONARDO: I wouldn't (unintelligible).
C. GREATHOUSE: I'm not I'm not gonna, lookee here.
LONARDO: Uhh but see . . .
C. GREATHOUSE: Where'd you get that?
LONARDO: You don't have any of that thing on hand do you? No?
C. GREATHOUSE: No, but I can get you some.
LONARDO: Uh no don't go through the trouble.
C. GREATHOUSE: No.
LONARDO: I just . . .
C. GREATHOUSE: Wednesday or Thursday.
LONARDO: Huh?
C. GREATHOUSE: Wednesday or Thursday we'll have the best.
LONARDO: I can wait.
C. GREATHOUSE: Okay.
LONARDO: No big deal.
C. GREATHOUSE: How's your lady doing anyway?
LONARDO: Been working.
C. GREATHOUSE: Is she working now.
LONARDO: Yeah.
C. GREATHOUSE: What she doing?
LONARDO: You mean Jordan?
C. GREATHOUSE: Yeah.
LONARDO: She's modeling.

C. GREATHOUSE: I didn't know she had a job.
LONARDO: She always been modeling.
C. GREATHOUSE: I thought you said she was out of work there for a long time.
LONARDO: Oh yeah for a long time she didn't work uh for quite a bit but that's her fault, because she gets lazy.
C. GREATHOUSE: What about her girl?
LONARDO: Huh?
C. GREATHOUSE: What about her little girl?
LONARDO: Still uh working on that I got some United States senator working on it now.
C. GREATHOUSE: Hmmm.
LONARDO: I don't know. Hope they can do her good.
C. GREATHOUSE: Well you never know, fly somebody over here. Karim and I are ready to go.
LONARDO: Well what we're gonna try to do this way see if it works. If it doesn't work we'll try something else.
C. GREATHOUSE: Yeah. Okay well I'll get rolling, I'll get moving for Wednesday or Thursday of this week.
LONARDO: Alright and I'll, I'll start calling.
C. GREATHOUSE: Because people will trust me til it's here.
LONARDO: Huh?
C. GREATHOUSE: The people will trust me til it's here but we gotta have enough going on to pay the people at least the cost. The cost will be 21 to 25.
LONARDO: 21 to 25.
C. GREATHOUSE: Whatever it takes.
LONARDO: I just missed this one guy. He just brought up this.
C. GREATHOUSE: You're kidding?
LONARDO: I'm serious.
C. GREATHOUSE: When?
LONARDO: Uh just a couple of days, see it took me two, three days to get in touch with him.
C. GREATHOUSE: Oh shit.

LONARDO: And then uh.
C. GREATHOUSE: What are they paying.
LONARDO: He come to see me yesterday and he says geez I'm leaving tomorrow which is today. He says I already made the deal I gotta go pick it up.
C. GREATHOUSE: Shit.
LONARDO: Yeah. That's what he's picking up.
C. GREATHOUSE: What's he paying (unintelligible)
LONARDO: (unintelligible) oh yes he did tell me I'm sorry.
C. GREATHOUSE: Find out what they're paying.
LONARDO: I think he said, it was a little under 40.
C. GREATHOUSE: Under 40?
LONARDO: Yeah.
C. GREATHOUSE: (unintelligible)
LONARDO: Huh?
C. GREATHOUSE: They could have made.
LONARDO: I'm just saying under.
C. GREATHOUSE: (sighs)
LONARDO: I think he' paying like 35.
C. GREATHOUSE: We we can sell it for thirty.
LONARDO: (unintelligible)
C. GREATHOUSE: As long as it's like this okay just pow, pow, pow, pow.
LONARDO: Yeah.
C. GREATHOUSE: That's the way I want it really I don't want no, I don't want nothing smaller than a quarter key.
LONARDO: Right.
C. GREATHOUSE: Okay, I don't want none of these little petty ass people.
LONARDO: Alright.
C. GREATHOUSE: If I get them forget it, I don't want nothing to do with 'em. They jam up me up too much.
LONARDO: See what I'll do, I'll (unintelligible) you'll know what I got it I'll show it to you if you want.

C. GREATHOUSE: Well as long as you told me you got the money.
LONARDO: I'll tell you where to drop it.
C. GREATHOUSE: Okay.
LONARDO: Let them go in there.
C. GREATHOUSE: Do their thing but I'm not . . .
LONARDO: Do their thing.
C. GREATHOUSE: I'm not I'm not going into offices.
LONARDO: Neither am I.
C. GREATHOUSE: I'll go here and I'll drop this to 'em and then they can walk it to the office they want to. I'm not sitting in an office like before.
LONARDO: Not me.
C. GREATHOUSE: Not me either. There's a lot of them people I don't trust . . . .

(background noises, talking)

You know it. And I'm gonna use every precaution I can from here on out.
LONARDO: See I had to pass that deal. I had to come up with the money remember that deal I told you that guy . . . sense.
C. GREATHOUSE: The sense yeah. Yeah. Are we gonna be able to get any of that stuff?
LONARDO: Well see I had to come up with some money and I couldn't do it. I had to come up with two "O".
C. GREATHOUSE: Yeah I know.
LONARDO: And cuz he wanted me to help him you know.
C. GREATHOUSE: Uh huh.
LONARDO: And uh (unintelligible) my son right now. Buying a house and I felt so bad askin' me for ten and I can't give it to him. Ten.
C. GREATHOUSE: Look at me.
LONARDO: Ten.
C. GREATHOUSE: I ain't been this broke in my life. Uh.

LONARDO: Like the one fucking attorney so far he's paid 167 and he hasn't even gone to court.

C. GREATHOUSE: You're kidding?

LONARDO: An appeal attorney. One, six, seven.

C. GREATHOUSE: What about uh . . .

LONARDO: And now he's got Willis working on this next case.

C. GREATHOUSE: You've gotta be kidding. You still like him?

LONARDO: Well he's alright, I can handle him.

C. GREATHOUSE: Okay.

LONARDO: He doesn't know anything (unintelligible)

C. GREATHOUSE: I don't even want Willis to know my name.

LONARDO: Huh?

C. GREATHOUSE: I don't even want Willis to know my name. He's part of the reason all this gossip's going around. And then when them two detectives . . .

LONARDO: Well that's because that guy from Michigan told him.

C. GREATHOUSE: Said

LONARDO: Whoever.

C. GREATHOUSE: Well the truth, what happened was that uh two detectives got on the stand and I asked my attorney about that and he said well if they can't get you to work with them they get on the stand and try to splatter your name on the streets.

LONARDO: Well, you guys should try to suppress that.

C. GREATHOUSE: We are, we are.

LONARDO: See because that's how you know this is all over town.

C. GREATHOUSE: Uh hm. But we are going to.

LONARDO: And that, that asshole used it to his advantage by telling people.

C. GREATHOUSE: That's okay, he's mine.

LONARDO: He's an asshole.

C. GREATHOUSE: You just get me his number and address and he's mine. I'm gonna go knock on his door with his new bride and everything else, I tell you something, you don't know how mad I am. You take a hungry hillbillly he gets he gets pretty violent.

LONARDO: (unintelligible)

C. GREATHOUSE: Well get a hungry hillbilly he gets pretty violent (pause) hey is uh Wednesday or Thursday good enough?

LONARDO: Oh yeah because then I got to hold these people all over.

C. GREATHOUSE: Oh so do I, so do I.

LONARDO: Yeah.

C. GREATHOUSE: Okay I'll order up for Thursday, okay and then we'll just break it down from here but I can only order one at a time right now. You know after a couple of times then I can get what we want.

LONARDO: What's it different people?

C. GREATHOUSE: No it's the same people.

LONARDO: Same guy?

C. GREATHOUSE: Yeah. What about uh, I uh, I was thinking about this yesterday. What about Richard, what is it Richard, what's the guy's name, the attorney down there? The attorney in Ft. Lauderdale.

LONARDO: I forgot.

C. GREATHOUSE: (laughs) see if you can find out I have too. I thought it was Richard, something like that.

LONARDO: I gave you the card.

C. GREATHOUSE: Yeah I know it, well you know hey (unintelligible) no I was just gonna talk to him that's all see I'm gonna look for a different quality.

LONARDO: Oh a different amount.

C. GREATHOUSE: Different qualities.

LONARDO: Uh huh huh?

C. GREATHOUSE: Quality.

LONARDO: Yeah.

C. GREATHOUSE: Come in here with some of the stuff that I was getting, you can forget it with them people.

LONARDO: (Unintelligible) more competitive.
LONARDO: Well your people get the best.
C. GREATHOUSE: Yeah oh yeah but the best ain't always the best.
LONARDO: Oh I see.
C. GREATHOUSE: If you know what I mean.
LONRADO: Yeah.
C. GREATHOUSE: You remember I got some of it that's little powdery (unintelligible) they don't want that stuff.
LONARO: Huh.
C. GREATHOUSE: They don't want that stuff up here. I'm gonna look for a couple new people and see what kind of prices they can give me.
LONARDO: Alright.
C. GREATHOUSE: They're people I already know, you know that have been there before.
LONARDO: Yeah, yeah, you don't want to meet no new people.
C. GREATHOUSE: No, no I don't I don't even want to meet no new girlfriends.

(laughter)

LONARDO: I don't either. (pause)
C. GREATHOUSE: Well my girlfriend and the kids they were sleeping in the car for the past three days and I didn't even know it. I didn't have no money to give to them and I went and borrowed a $110.00 last night, went and got 'em a room for a week until I can help, see, see what's going on. (sighs) and don't think that don't get on your nerves, you know it does.
C. GREATHOUSE: Where'd Jerome go? I don't see him in the car.
LONARDO: What?
C. GREATHOUSE: What's Jerome doing? Oh he's in the car.
LONARDO: I saw him as I walked in.
C. GREATHOUSE: Yeah, he was gonna come in and have some soup, you weren't here but I don't want him

to hear nothing, I don't want Michael to hear nothing. I'm doing everything myself.
LONARDO: How's he doing down there?
C. GREATHOUSE: Huh?
LONARDO: Michael.
C. GREATHOUSE: He get's out next week.
LONARDO: Huh?
C. GREATHOUSE: Next week.
He's been in 30 some days.
LONARDO: Huh?
C. GREATHOUSE: He's been in 30 some days.
LONARDO: Is he okay?
C. GREATHOUSE: Oh yeah. Yeah he's he's tight, keeping his mouth shut. In fact he uh, he ordered that nobody, his attorneys ordered that nobody sees him or talks to him without his presence. He's he's a lot tighter than I expected. My brother Forest was the one that really messed me up.
LONARDO: Who?
C. GREATHOUSE: Forest.
LONARDO: How's uh Peggy.
C. GREATHOUSE: Oh she's fine.
LONARDO: I haven't even tried calling her you know.
C. GREATHOUSE: Oh you can call her.
LONARDO: Yeah but if the line's been tapped . . .
C. GREATHOUSE: Well a pay phone.
LONARDO: Uhh . . .
C. GREATHOUSE: Her phone's only a week old and I know it's not been tapped and it's in a fictitious name so . . . You got no problems there, plus if they hear you you ain't going to talk to her about nothing no way.
LONARDO: Huh?
C. GREATHOUSE: You ain't gonna talk to her about nothing.
LONARDO: No.
C. GREATHOUSE: In fact she asked me what, she asked me, says let's go down to dinner. I said no honey I said you can go down for dinner but not me.

LONARDO: Oh tell her to come in anytime she wants.

C. GREATHOUSE: Yeah I told her, she wanted to bring her father down for dinner.

LONARDO: Yeah.

C. GREATHOUSE: No we we got this case against me beat with hands down, not worried about that.

LONARDO: Uh hm.

C. GREATHOUSE: As long as they don't come out with no new indictments. I don't know one way or the other.

LONARDO: Well . . .

C. GREATHOUSE: But as of right now there is none I know that but uh, they shafted me good. A fourth degree felony, a hundred thousand dollars, can you believe it.

LONARDO: That don't even make sense.

C. GREATHOUSE: It didn't make sense to my attorney it didn't make sense to me, it didn't make sense.

LONARDO: Can't you get it lowered?

C. GREATHOUSE: No this is the best, well they had it cash, aa hundred thousand cash, and then they got hundred surety. That's is low as they would go. They wanted me bad, real bad. So I just walked in and give to to him, told 'em now they can quit looking but what's the damn sense in running and hiding they gonna just keep on raiding as long as you hide, they'll raid, but I'm gonna do everything myself and I'm gonna make damn sure there ain't no slip-ups every day, I'm not letting Michael deliver, I'm not letting Jerome deliver. The only thing that you'll ever hear from them is setting up my meetings (unintelligible) That's it.

LONARDO: You'll do it yourself?

C. GREATHOUSE: I'm doing everything.

LONARDO: Don't you think they'll follow you.

C. GREATHOUSE: (sighs) I'm gonna put it this way, I'm gonna make damn sure they don't. Cuz I'm not moving when somebody asks me to, I'm moving when I want to.

C. GREATHOUSE: If you know what I mean, I just don't trust these kids. I don't trust these kids and the way they do things.

LONARDO: They get careless.

C. GREATHOUSE: Yes they do, in fact that's one reason that I'm in the trouble I'm in now. Kids, not me it was them.

LONARDO: Ohh.

C. GREATHOUSE: I think I can work it out. We'll see when the time comes if I have to use em I will, but if I think it's unsafe for me then I'll use them okay. And if you think that I should use one of em then I'll use one of em.

LONARDO: Oh I don't know I'm just . . .

C. GREATHOUSE: Well I'm I'm gonna have to use my own mind in this. I can do it either way.

LONARDO: Huh?

C. GREATHOUSE: I can do it either way.

LONARDO: Alright.

C. GREATHOUSE: Whatever you think is (unintelligible) you think it's best the other way we'll do it, you think it's best that I do it then we'll do it that way.

LONARDO: Alright.

C. GREATHOUSE: I'm just gonna go ahead and get on the box and order for Thursday, I'm gonna spend the evening at the campground with the old lady. (unintelligible).

C. GREATHOUSE: I certainly will and then I'll her her to come down for dinner.

LONARDO: Yeah do it, then I'll talk to you.

C. GREATHOUSE: Okay, I'll catch you later oh that's right you gotta get that . . .

WAITRESS: No dessert today huh, nothing?

C. GREATHOUSE: No dessert today honey, no dessert. I'll get the bill.

WAITRESS: (unintelligible) this for you then.

C. GREATHOUSE: Please.

WAITRESS: (unintelligible)

(Unintelligible conversation)

LONARDO: Three pennies.
WAITRESS: Uh huh.
C. GREATHOUSE: (unintelligible)
LONARDO: Do you have three pennies?
C. GREATHOUSE: No, I got (unintelligible)
WAITRESS: That's out of five dollars.
LONARDO: That's alright.
C. GREATHOUSE: Don't call me till . . .
LONARDO: Huh?
C. GREATHOUSE: Call me Thursday.
LONARDO: Thursday?
C. GREATHOUSE: Thursday morning.
LONARDO: I'll call you (unintelligible) either just before lunch or right after.
C. GREATHOUSE: O'kay by then I'll be ready.
C. GREATHOUSE: All right I'll see you.
LONARDO: Bye . . . bye

(Static)

C. GREATHOUSE: No you don't get the pleasure of driving back.
J. GREATHOUSE: Huh?
C. GREATHOUSE: You don't get the pleasure of driving back (laughs) you wanna be seen in that big pretty bomb huh?
J. GREATHOUSE: Come on let me drive.
C. GREATHOUSE: Uh uh, uh uh. It's gonna be my pleasure.

(Starts Car Engine)

C. GREATHOUSE: O'kay I have to take you home and get my glasses, o'kay. Let's see what's the best way . . . straight down Broadview to 71.
J. GREATHOUSE: Uhh . . .
C. GREATHOUSE: What time is it?
J. GREATHOUSE: Snow Road uh down Broadview to uh Ridge . . . wait a minute . . . yeah down Broadview to Ridge.

C. GREATHOUSE: O'kay . . . you . . .

(Background Sounds)

C. GREATHOUSE: o'kay (unintelligible)

(Turns radio on . . . music in background)

J. GREATHOUSE: (unintelligible) go down Brookpark to get to Ridge.
C. GREATHOUSE: To get to where.
J. GREATHOUSE: To get to Ridge Road (unintelligible) make a left here.
C. GREATHOUSE: Make a left?
J. GREATHOUSE: Yeah.
C. GREATHOUSE: Are you sure?
J. GREATHOUSE: Yep.
C. GREATHOUSE: (Unintelligible oh you want to go down Ridge.
J. GREATHOUSE: You wanna go, take me home right.
C. GREATHOUSE: Yeah.
J. GREATHOUSE: Well then you go down Ridge, I live right off of there.
C. GREATHOUSE: Okay. Yeah, I need you to go in the house and get my glasses for me. I'm sure man I'm sure I saw them things I mean I had them, cause I'm gonna be gone for the rest of the day.

(pause) (music in background)

C. GREATHOUSE: What's that.
J. GREATHOUSE: (Unintelligible). Oh, that's right.
C. GREATHOUSE: I like this song.

(music in background)

C. GREATHOUSE: Here put these keys on my ring (unintelligible).

(coughing in background)

(music in background)

J. GREATHOUSE: Where do you want me to start making them appointments for you.

C. GREATHOUSE: Uhh, Monday, Tuesday, I wanna rest.

J. GREATHOUSE: (unintelligible) Monday or Tuesday or just wait till Monday (unintelligible).

C. GREATHOUSE: Wait till Monday or Tuesday to make 'em, okay. Meanwhile I want you to get a hold of Costanzo and I want some money, I don't care if it's a hundred dollars, okay? Tell him tell him I got it rolling for Thursday. Tell him I got things and they're rolling for Thursday and by God I need I want some money. Tell him I don't have money for groceries and look go over there and get me a couple hundred dollars or whatever, okay.

J. GREATHOUSE: Alright, I'll do what I can.

C. GREATHOUSE: No we're gonna get it, if you don't, I will.

J. GREATHOUSE: Well I'll do what I can.

C. GREATHOUSE: You do what you can and if he don't give it to you then he's gonna talk to me, before Thursday too, and tell him to get his money and everything ready for Thursday, for Thursday delivery. Tell him nobody can have more than a quarter key okay?

J. GREATHOUSE: You have to pay for it up front though right?

C. GREATHOUSE: Uh at least uh I want at least 8000 up front on a quarter key but I'm selling him quarter keys for 12,500 ain't I or 13,000? What am I selling quarter keys for there?

J. GREATHOUSE: (uh) Uh, you know I think 12,500 or 13,000 (unintelligible) one of the two.

C. GREATHOUSE: Twelve thousand . . . twelve five I think . . . 12 and 12 is 24, 48 (unintelligible) yeah that's 50,000 a key, okay. I don't want no small buyers on this first key if I can help it, okay?

(Continuous music in background)

C. GREATHOUSE: That's a pretty Pontiac, huh?

J. GREATHOUSE: (Unintelligible).

C. GREATHOUSE: Is this Ridge Road right here. Yeah, that's Ridge huh? That's a Pontiac . . . ain't it?

J. GREATHOUSE: (Unintelligible).

C. GREATHOUSE: Convertible . . . Coupe DeVille.

J. GREATHOUSE: Grandville.

C. GREATHOUSE: Or Grandville, yeah. That is pretty. (unintelligible made me nervous. God damn sick whore right now. I drank a coup of fucking coffee. It couldn't have been decaffinated . . . I drink one cup of coffee and it tears my God damn nerves all to pieces.

J. GREATHOUSE: Thirty nine eighty eight for that car.

C. GREATHOUSE: Huh?

J. GREATHOUSE: Thirty nine eighty eight.

C. GREATHOUSE: Thirty nine eighty eight.

J. GREATHOUSE: You wanna go where these. . .

C. GREATHOUSE: (Unintelligible).

J. GREATHOUSE: On the (unintelligible).

C. GREATHOUSE: On the Gold Wing yeah boy these are pretty ain't they. That's the kind I want to get one of these day (pause) Someday, who knows.

J. GREATHOUSE: Take a right here.

C. GREATHOUSE: I have to take a couple of Anacin freaking migraine headaches. I gotta stay away from the beer, man.

J. GREATHOUSE: (Unintelligible).

C. GREATHOUSE: I get too wild.

J. GREATHOUSE: He bought me a beer last night I said nope, I don't drink beer.

(Car engine sounds)

(Music in background)

C. GREATHOUSE: Where's my pepsi. Did you drink it?

J. GREATHOUSE: Not here.

C. GREATHOUSE: Oh you rascal.

(laughter)

C. GREATHOUSE: Right there.

(pause)

J. GREATHOUSE: You know where you're going don't you. You was drunk whenever I told you.

C. GREATHOUSE: Huh?

J. GREATHOUSE: You was drunk when I told you where the room was.

C. GREATHOUSE: Uhh Murphy's.

J. GREATHOUSE: Right, okay. What number.

C. GREATHOUSE: I don't know.

(laughter)

C. GREATHOUSE: What number I'm going to.

J. GREATHOUSE: 18.

C. GREATHOUSE: 18?

J. GREATHOUSE: Yeah.

C. GREATHOUSE: Okay.

J. GREATHOUSE: They got phones in the rooms you can call out there.

C. GREATHOUSE: Oh you can. Oh good . . . kitchenette?

J. GREATHOUSE: No, there's no room.

C. GREATHOUSE: Two double beds.

J. GREATHOUSE: Yeah.

C. GREATHOUSE: Okay. (pause) I'll have to go out there and take the kids. I'll have to take the kids out to eat . . . play with them for a little while. But I don't know if she had any money with her. I didn't ask her. (pause) Here's my key . . . no wait till I get up there. I got to go to the restaurant anyway. Get me another Pepsi. Since you bad ass drank it. I just can't trust you even with my Pepsi in the car.

J. GREATHOUSE: God damn you sat in there and chowing down man and drank. . .

C. GREATHOUSE: Chowed, give me the God damn soup that looked like puke.

J. GREATHOUSE: I'm sitting out in the car in the old hot sun, the old hot Pepsi, it was hot anyways you weren't drinking it.

C. GREATHOUSE: Oh shit, yeah that soup was shit, uh maybe it was just because I ddin't feel too good. Uh quarter till three. I'm here, you wanna come in, come in for ja minute. (background noises) Wish they would keep from leaving God damn garbage in my door. (Background noise) Get me a Pepsi Free out of the refrigerator will you Jerome? (Pause) (Goes to bathroom) ooh I was backed up to a gallon, I was backed up to a gallon, all that coffee, uh now I feel better even if I don't look no better. I had to do something. Then we really, I should take my vitamins with me because I don't think I'm gonna come home tonight, I don't think. (pause) Uh shit. . .

J. GREATHOUSE: (unintelligible)

C. GREATHOUSE: I got, oh that's right I got a carton in the car, okay, all right uh you ready, I'll drop you off over by your place here . . . get me Pepsi Free.

J. GREATHOUSE: (unintelligible) o'kay.

C. GREATHOUSE: O'kay huh?

J. GREATHOUSE: I should be able to walk to my house from here you know.

C. GREATHOUSE: Think you can.

(laughter)

C. GREATHOUSE: (unintelligible) all right you gonna get a hold of Bob and I'll get back to you in an hour or so.

J. GREATHOUSE: (unintelligible) I'll get a hold of him (unintelligible)

C. GREATHOUSE: Quarter to three (unintelligible) o'kay.

(Background noise)

J. GREATHOUSE: Catch you later.

C. GREATHOUSE: all right you leaving right now.
J. GREATHOUSE: Yeah.
C. GREATHOUSE: O'kay . . . hey I'm gonna call you in an hour.
J. GREATHOUSE: Well (unintelligible) might be at Bob's call me on the beeper.
C. GREATHOUSE: o'kay I'll call you on the beeper . . . if you get yeah, uh, I'm leaving now and I will meet you at 4:00.
Four betwen four and four thirty, all right, bye.

(Background Sounds)

C. GREATHOUSE: (unintelligible)
C. GREATHOUSE: Yeah I can be out there by that time.

(unintelligible conversation)

(Background Sounds)

C. GREATHOUSE: My keys . . . o'kay I'm gonna I'm gonna go out and try to pick up some money too at 4:00, o'kay.
J. GREATHOUSE: (unintelligible)
C. GREATHOUSE: Yep . . . I've gotta stop and pick up some money before I go out to see her.
J. GREATHOUSE: (unintelligible)
Yeah, yeah.
(unintelligible)
C. GREATHOUSE: I'm gonna try to . . .
J. GREATHOUSE: All right I'll I'll get over and try to see Bob.
C. GREATHOUSE: O'kay . . . that's right.
J. GREATHOUSE: What.
C. GREATHOUSE: O'kay nothing.
I'll get on Eddy.
Hey if Eddy pages you . . .
J. GREATHOUSE: Yeah. . .
C. GREATHOUSE: Uh, tell him to expect a call from me, too, because I'm gonna have to page him tell him where to meet me . . . o'kay.

(Radio in Background)

(pause)

(Background Sounds)

(Long pause)

(Humming to himself)

(Whistling Noise)

C. GREATHOUSE: (unintelligible)
C. GREATHOUSE: (Unintelligible) (unintelligible) God damn receipt (unintelligible).

(sighs)

(background sounds)

C. GREATHOUSE: Uh there it is (unintelligible). Here it is. Break my damn ankle. Okay.

(background sounds)

C. GREATHOUSE: (Unintelligible) huh (unintelligible) go find 'em.

(background sounds)

(phone rings)

C. GREATHOUSE: (Unintelligible) A little.

(Unintelligible conversation)

C. GREATHOUSE: Get up off that shit.

(laughter)

C. GREATHOUSE: Get up off of that. (unintelligible). One time.
ROSELETTI: $35 this room is gonna cost me. Holy (unintelligible). More than . . . 68. (Unintelligible). 68 . . . where do you see 68.
C. GREATHOUSE: Where's (unintelilgible) your pencil?

(laughter)

Tape ends.

GOVERNMENT EXHIBIT 3B

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 5/31/84

The attached is a transcript of a conversation between CLARENCE GREATHOUSE and ANGELO J. LONARDO on May 17, 1984.

C.G. 9-24-84

Investigation on 5/17/84 at Cleveland Ohio File # CV 245A-58-71G by SA ROBERT A. FIATAL/dml. Date dictated 5/23/84.

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CV 245A-58

5/17/84

OPERATOR: At the tone the time will be 8:11 and ten seconds.

(Dialing/ringing)

FEMALE: Good evening. Cleveland P.M.
CLARENCE GREATHOUSE: Yes uh Angelo please.
FEMALE: Can you hold on one second?
GREATHOUSE: Yes.
FEMALE: Thank you.

(Pause)

ANGELO LONARDO: Hello.
GREATHOUSE: Hello sir.
LONARDO: How are you doing?
GREATHOUSE: Fine. Are you on an open phone?

LONARDO: Not really.
GREATHOUSE: Okay.
LONARDO: Uh are you?
GREATHOUSE: Yeah.
LONARDO: Well . . .
GREATHOUSE: I'm free.
LONARDO: Hold on a minute and uh I'll give you a number, okay?
GREATHOUSE: Okay.
LONARDO: Hold on.

(Pause)

LONARDO: Hello.
GREATHOUSE: Yeah.
LONARDO: Yeah call me on 7877.
GREATHOUSE: Same first three digits?
LONARDO: Yeah.
GREATHOUSE: Okay, you got it.
LONARDO: Alright. Bye.

(End of call)

(Dialing/ringing)

LONARDO: Hello.
GREATHOUSE: Yeah.
LONARDO: Yeah.
GREATHOUSE: Okay.
LONARDO: Yeah.
GREATHOUSE: Alright, nothing, nothing matured.
LONARDO: Uh huh.
GREATHOUSE: So I couldn't come up with any kind of color.
LONARDO: Uh huh.
GREATHOUSE: Uh what I have planned is I planned a flight. I got it scheduled for Sunday morning.
LONARDO: Yeah.
GREATHOUSE: Arriving back here on Sunday evening and everything is set on that end.
LONARDO: Uh huh.

GREATHOUSE: But I need $6 is what I need. I talked to a few people and I've got between now and Sunday to do it. But I'm goin' Sunday come hell or high water.

LONARDO: Uh huh.

GREATHOUSE: I don't care if where I gotta go but I need $6 to take with me and be back Sunday night and then the uh balance is gonna follow up.

LONARDO: Uh huh.

GREATHOUSE: You think you can help me any with that?

LONARDO: I'll see what I can do.

GREATHOUSE. Okay I'll tell you what, I will need it by no later than Saturday, well you know.

LONARDO: I'll work on it.

GREATHOUSE: Yeah. Okay. Well $6 is all I need. I got the rest.

LONARDO: Okay. There's uh . . .

GREATHOUSE: And everything else will be fronted to me.

LONARDO: Your wife didn't have any of those frijoles today then.

GREATHOUSE: No, she's outta town.

LONARDO: Oh alright.

GREATHOUSE: She went outta town on me. And then I stayed here to take care of this. No, no frijoles. I'll make sure that she makes some though when she says she's comin' down for dinner. Her and her father.

LONARDO: Right.

GREATHOUSE: But uh . . .

LONARDO: And evidently there's nothing else right?

GREATHOUSE: No, there is nothing else.

LONARDO: Alright.

GREATHOUSE: In fact I was looking around uh you know . . .

LONARDO: Yeah.

GREATHOUSE: Some frijoles for myself and couldn't even find any.

LONARDO: Alright, but uh I don't care, I'll go to Chi Chi's.

GREATHOUSE: Yeah. Well right now I've got, I've got the rest of it. That's all I need to conclude my uh . . .

LONARDO: Yeah.

GREATHOUSE: Well, actually to conclude everything. Okay?

LONARDO: Yeah.

GREATHOUSE: Alright, I'll wait for a call from ya. I won't be bothering you. I'll wait for a call from you.

LONARDO: I will (inaudible).

GREATHOUSE: Okay, tomorrow or Saturday either one.

LONARDO: Right.

GREATHOUSE: Okay, bye-bye.

(End of call)

GOVERMENT EXHIBIT 5B

FEDERAL BUREAU OF INVESTIGATION

(1) Date of transcription 5/29/84

Attached is a transcript of a conversation between Clarence Greathouse and Angelo J. Lonardo on May 19, 1984.

C.G. 9-24-84

Investigation on 5/19/84 at Cleveland, Ohio File # CV 245A-58-67A by SA ROBERT A. FIATAL/rl. Date dictated 5/24/84.

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CV 245A-58
5/19/84

Clarence Greathouse
Angelo J. Lonardo
Hardrick L. Crawford
Robert F. Connole

NAGRA BODY RECORDING

CONNOLE Okay, this is Special Agent Robert Connole with Special Agent Hardrick Crawford and we're with Clarence Greathouse and ah, we have searched Mister Greathouse and he has no money on him. We've also searched his vehicle and there's no money in the vehicle. It's ah, three minutes to 11, Saturday, May 19th, 1984.

GREATHOUSE It's still a Timex, but it's right. Ah . . . Drick.

CONNOLE We'll follow you

CRAWFORD Okay C.

GREATHOUSE Yeah.

CONNOLE Uh, when you get there . . .

GREATHOUSE Hey, Drick open the gates.

CRAWFORD Got it.

CONNOLE You should give us about thirty seconds to get ahead of you and go in. Or you know, do what we're gonna do.

GREATHOUSE No, no.

CONNOLE We won't pull in the parking lot.

GREATHOUSE Okay.

CONNOLE I might, well, I might make a phone call. Do you think? Go to the P.M. and make a phone call if I see him come out?

GREATHOUSE No, no.

CONNOLE Okay.

GREATHOUSE Just watch me. I'll be back. Alright.

(CAR DOOR)

(NO CONVERSATION OVERHEARD WHILE GREATHOUSE DRIVES)

GREATHOUSE Hello young man.

LONARDO How ya doin'?

GREATHOUSE Fine.

(CAR DOOR)

LONARDO Whew, that was a fuckin' party.

GREATHOUSE Well . . .

LONARDO But that's all. I was a little (unintelligible) to see so many people.

GREATHOUSE Hell, they're just celebrating, they're celebratin' your birthday, that's all.

LONARDO But I had one guy come in and he . . .

GREATHOUSE Uh huh.

LONARDO . . . gave me a thousand.

GREATHOUSE Oh good.

LONARDO And ah . . .

GREATHOUSE Well, I only got one more person to see and I'm gone but the stuff's already on it's way.

LONARDO And that's it, you know, the . . .

GREATHOUSE Well . . .

LONARDO This here's all dollars.

GREATHOUSE Don't worry. It'll be returned startin' tomorrow. Well, I'm not gonna work till Monday.

LONARDO Uh huh.

GREATHOUSE Okay?

LONARDO Yeah.

GREATHOUSE Cause it still, I'm plannin tomorrow, I'll be back tomorrow night at 8:46 and it'll already be here. I'll be, I'll be opened up Monday. I'm gonna set up two days in a motel. I only wanna go through one a week and that's it.

LONARDO Uh huh.

GREATHOUSE No more unless we get ah, you know, straight shot. You know?

LONARDO Okay.

GREATHOUSE But happy birthday.

LONARDO Alright, thank you.

GREATHOUSE Alright. I'll see ya later.

LONARDO I have to be goin'.

GREATHOUSE Have a nice evening.

LONARDO Alright.

GREATHOUSE Alright

LONARDO There was some people in there that, you know, their mouths may be doin' this if you walk in.

GREATHOUSE Oh, I don't wanna come in there.

LONARDO Alright.

GREATHOUSE Okay, I'll see you later.

(CAR DOOR)

(PAUSE)

GREATHOUSE (whistling) Got to sing . . . eh, di, di, do, do, do, do . . .

(PAUSE)

GREATHOUSE Shit. Come on . . . Bob? Where the hell you at? They're good when you can . . . Pretty good.

(PAUSE)

(CAR DOOR)

(GREATHOUSE ON TELEPHONE)

GREATHOUSE Hello honey, is ah, Drick or either one called? Huh? Okay. They might call. If they call tell 'em I'm on my way back to the house. And I left my pager sittin' there. Is it still sittin' there? Huh? Has it went off? Well listen for it to go off cause it might be one of them pagin'. I lost all four of 'em but I'm on my way back there. Put on a pot of coffee, er make me a cup of coffee. Alright. Bye. (HANGS UP)

(CAR DOOR)

(NO CONVERSATION OVERHEARD WHILE GREATHOUSE DRIVES)

(CAR DOOR)

(MOVEMENT)

(GREATHOUSE ON TELEPHONE)

GREATHOUSE Yes, could you raise ah, Crawford or Connole on the radio, sir? Eh, could you get ahold of Crawford or Connole? Pardon? Would you raise 'em on the radio? Tell 'em to call Bullman. Yes. Bye bye. (HANGS UP) Honey . . . I'm hungry.

PEGGY GREATHOUSE What?

GREATHOUSE I'm hungry. I'm also tired. Thank you for getting me some cigarettes (whispering inaudibly)

(CLOCK CHIMES)

(PAUSE)

(SIREN)

GREATHOUSE Make a couple of bowls of, heat up a couple, three bowls of that chili that you got. Is it still good?

(END SIDE ONE)

(BEGIN SIDE TWO OF COPY TAPE)

CONNOLE How the hell'd you get home so fast?

GREATHOUSE That's pretty good when I lose all of ya.

CONNOLE I know. Goddamn.

GREATHOUSE Where'd Drick go?

CONNOLE He's tryin' to get you on the phone. He said eh, the guy just called us and said ah, you were ah, you wanted to call him, I mean, I mean, call the, call the office.

GREATHOUSE (laughs) Pretty damn good when I can move in and move out and lose all four of ya.

CONNOLE You did. We thought you were inside.

GREATHOUSE Well where, where'd you think my car was? Inside too?

CONNOLE No, I, see, we didn't go in there. Hey, Ron, get ahold of ah, Drick and tell him to come on over the house. That ah, our man's here. Okay? Thanks. (HANGS UP)

GREATHOUSE Yeah.

CONNOLE He give you the money?

GREATHOUSE In my coatpocket there. Specified how much he was givin' . . .

(RECORDER TURND OFF—END TAPE)

GOVERNMENT EXHIBIT 7B

FEDERAL BUREAU OF INVESTIGATION

Date of transcription June 1, 1984

The following is a transcript of a recorded telephone conversation between Clarence Greathouse & Angelo J. Lonardo which took place on May 21, 1984 at Cleveland, Ohio.

C.G. 9-24-84

Investigation on 5/21/84 at Cleveland Ohio. File # CV 245A-58 by SA ROBERT A. FIATAL/nkb. Date dictated 5/25/84.

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CV 245A-58

5/21/84

Clarence Greathouse & Angelo J. Lonardo.

(Dial Tone)

(Dialing sound)

FEMALE: At the tone the time will be 9:45 and 20 seconds.

(Dial Tone)

(Dialing Sound)

(phone rings)

LONARDO: Hello.

GREATHOUSE: Yeah how do you do sir . . .

LONARDO: O'kay.

GREATHOUSE: I'm chewing ten penny nails in two.
LONARDO: Huh?
GREATHOUSE: I says I'm chewing ten penny nails in two . . .
LONARDO: How come?
GREATHOUSE: Uh I got a bad batch.
LONARDO: You did?
GREATHOUSE: Yep . . . and I sent . . . I shipped it right straight back and I'm waiting on Atlanta tomorrow morning.
LONARDO: Uhha.
GREATHOUSE: I'll be back here tomorrow night.
LONARDO: All right.
GREATHOUSE: I got . . . I'm so fucking . . . I can't even say how pissed off I am.
LONARDO: Uhha.
GREATHOUSE: But they uh . . . they said my uncle come up with a Gerome from Kentucky . . .
LONARDO: Yeah.
GREATHOUSE: He might . . . might took off down to Atlanta and he'll be back in here tomorrow night . . . short.
LONARDO: O'kay.
GREATHOUSE: O'kay.
LONARDO: Yeah.
GREATHOUSE: So give me a call tomorrow night uh . . .
LONARDO: Oh I'll call you Wednesday . . .
GREATHOUSE: Yeah call me Wednesday.
LONARDO: All right.
GREATHOUSE: cuz I'm gonna be busy tomorrow night . . .
LONARDO: O'kay.
GREATHOUSE: All right . . . bye . . .bye.

(hangs up phone)

GOVERNMENT EXHIBIT 9B

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 5/30/84

The following is a transcript of a recorded telephone conversation between CLARENCE GREATHOUSE and ANGELO J. LONARDO which took place on May 24, 1984 at Cleveland, Ohio.

Investigation on 5/24/84 at Cleveland, Ohio. File # CV 245A-58 by SA ROBERT A. FIATAL/dml. Date dictated 5/29/84.

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CV 245C-5

5/24/84

OPERATOR: At the tone the time will be 2:20 exactly.

(Beep)

CLARENCE GREATHOUSE: 243.

(Dialing/busy signal)

(Dialing/busy signal)

ANGELO LONARDO: Hello.
CLARENCE GREATHOUSE: How do you do sir?
LONARDO: Alright. Sorry I didn't call you back last night but one of my people didn't show and I worked till 3:30.
GREATHOUSE: Really?

LONARDO: Yep.
GREATHOUSE: You had to work the club yourself?
LONARDO: Yep.
GREATHOUSE: Son of a bitch.
LONARDO: Yeah so I know.
GREATHOUSE: What's the, what's the possibility of sitting down for a cup of coffee?
LONARDO: Uh I won't be able to do it until evening.
GREATHOUSE: Till this evening?
LONARDO: Yeah.
GREATHOUSE: That'd be fine.
LONARDO: Okay, I'll call you around 6:30 or so.
GREATHOUSE: That sounds real good.
LONARDO: Make it seven.
GREATHOUSE: Okay, we'll have coffee because I don't wanna say on the phone. I picked, I got myself a room . . .
LONARDO: Yeah.
GREATHOUSE: Settled in at another location. I didn't like that one.
LONARDO: Alright, I'll call you later.
GREATHOUSE: Okay. Call me about, at what time you said.
LONARDO: Well I'll call you like 6:30, 7:00.
GREATHOUSE: That sounds good.
LONARDO: Alright.
GREATHOUSE: I'll be waiting for ya, bye-bye.

(End of call)

GOVERNMENT EXHIBIT 10B

FEDERAL BUREAU OF INVESTIGATION

(1) Date of transcription 6/4/84

Attached is a transcript of a conversation between Clarence Greathouse and Angelo J. Lonardo on May 24, 1984.

C.G. 9-24-84

Investigation on 5/24/84 at Cleveland Ohio. File # CV 245A-58 by SA ROBERT A. FIATAL/rl. Date dictated 5/29/84.

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CV 245A-58 — Clarence Greathouse
5/24/84 — Angelo J. Lonardo
TELCALL

(DIALING-RINGING)

RECORDING At the tone the time will be 7:49 and ten seconds.

(REDIALS-RINGING)

LONARDO Hello.
GREATHOUSE Hello sir.
LONARDO Yeah.
GREATHOUSE (laughs) Okay. Uh, can you meet me at the ah, Airport Sheraton?
LONARDO The airport?
GREATHOUSE I'm on a clear, clear phone. It's like a . . .

LONARDO Huh?
GREATHOUSE . . . goin' to the airport to get a airplane tickets?
LONARDO Yeah.
GREATHOUSE Just before you get to the airport, there's a Sheraton Hotel.
LONARDO Uh, alright, but it won't be till around ten o'clock.
GREATHOUSE Ten o'clock'll be fine.
LONARDO Alright. Uh . . .
GREATHOUSE Okay
LONARDO . . . I'll call when I'm on my way out there.
GREATHOUSE Sounds good.
LONARDO Okay?
GREATHOUSE Okay.
LONARDO Alright.
GREATHOUSE Cause I have another meeting at eight o'clock anyway.
LONARDO Alright, I'll call and then you can, you know, you can go to another phone and . . .
GREATHOUSE Okay.
LONARDO I'll be, when I call you, I'll be on a public phone.
GREATHOUSE No problem.
LONARDO Alright.
GREATHOUSE Bye.

(CALL TERMINATED)

GOVERNMENT EXHIBIT 11B

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 5/30/84

The following is a transcript of a conversation between CLARENCE GREATHOUSE and ANGELO J. LONARDO which took place on May 24, 1984 at Cleveland, Ohio.

Clarence Greathouse 10-1-84

Investigation on 5/24/84 at Cleveland, Ohio. File # CV 245A-112 by SA ROBERT A. FIATAL/dml. Date dictated 5/29/84

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CV 245A-58

5/24/84

(Unintelligible conversation)

CLARENCE GREATHOUSE: God damn (inaudible).

(Unintelligible conversation)

GREATHOUSE: Glass of ginger ale?
ANGELO LONARDO: Yeah. I tell you, my fucking stomach, well right after this Memorial holiday I call my doctor. My doctor tells me he doesn't want me drinking for two weeks.
GREATHOUSE: Uh huh.
LONARDO: (Unintelligible).
GREATHOUSE: Well I haven't been drinking (inaudible).

LONARDO: That's good enough.

GREATHOUSE: (Inaudible). Check it out. We'll see, don't want it too granulated.

LONARDO: Uh huh.

GREATHOUSE: My old lady's been bugging me.

LONARDO: It won't kill her to (unintelligible).

GREATHOUSE: (Inaudible).

LONARDO: Here, separate it.

(Pause)

GREATHOUSE: That's right. You're not too good at separating.

LONARDO: No, I make 'em too thick.

GREATHOUSE: (Unintelligible) oh shit. Damn. See what you think.

LONARDO: Hmm hm.

(Beeping)

LONARDO: I don't (unintelligible). We'll do this other one (unintelligible) and take off if you have to make a call.

GREATHOUSE: Huh?

LONARDO: You know because I'll be able to spend more time with ya tomorrow.

GREATHOUSE: Well that's a fucking girls.

LONARDO: Huh?

GREATHOUSE: Fucking girl. I can't do it too fast. Just can't do it too fast.

LONARDO: Well . . .

GREATHOUSE: Did you talk to some of 'em?

LONARDO: Huh?

GREATHOUSE: Talk to some of 'em? Some of the people?

LONARDO: Yeah. See I had talked to 'em about the other, the other figure.

GREATHOUSE: Yeah.

LONARDO: So then when I saw the thing I says shit, can't go back to these you know. I says when I see you I would explain to you, I didn't wanna say that to Peggy on the phone.

GREATHOUSE: No, no don't say nothing to nobody.

LONARDO: I never do.

GREATHOUSE: Yeah.

LONARDO: And I didn't wanna talk to you on the phone either.

GREATHOUSE: Yeah. Don't say nothing on the phone.

LONARDO: Cause I told 'em that whenever I quote a future for the Christmas trees it stays that way.

GREATHOUSE: Yeah.

LONARDO: But you know you must pay now so that the price stays.

GREATHOUSE: (Inaudible).

LONARDO: Huh?

GREATHOUSE: We're talking 31. We're talking 31 for a whole.

LONARDO: Yeah.

GREATHOUSE: If we gotta go quarter.

LONARDO: Yeah I understand.

GREATHOUSE: Huh?

LONARDO: Now I understand.

GREATHOUSE: Okay. Well I didn't know what you was saying.

(Pause)

GREATHOUSE: So what's it, what's it look like for tomorrow?

LONARDO: I'll try to get a hold of some people. I don't know. I really don't know.

GREATHOUSE: Alright then I'm gonna go ahead and start doing my move.

LONARDO: Do whatever you have to till I, you know, we work this thing. Cause all I told 'em was that it was off for right now rather than go back and say it's, you know, then they say fuck this guy. So I just told 'em well every-thing's off right now. So I have to back . . .

GREATHOUSE: Okay. (Unintelligible). What about Ronnie?

LONARDO: Huh?

GREATHOUSE: (Unintelligible). What about Ronnie?

LONARDO: I didn't contact him. But uh I will contact him.

GREATHOUSE: Okay cause I don't wanna be sitting on this shit.

LONARDO: You can't.

GREATHOUSE: I wanna get outta here.

LONARDO: Right.

GREATHOUSE: I can't sit here (unintelligible) today.

LONARDO: Alright, I'll call you tomorrow.

GREATHOUSE: Okay.

LONARDO: And then uh I'll come have a cup of coffee with you somewhere.

GREATHOUSE: Okay.

LONARDO: Okay? I mean other than here or whatever.

GREATHOUSE: Okay.

LONARDO: Cause you got your beeper anyway.

GREATHOUSE: Yeah.

LONARDO: Alright? Matter of fact I'll try to contact some people tonight.

GREATHOUSE: Okay.

LONARDO: I'll see ya.

GREATHOUSE: Want to take this and show them?

LONARDO: Yeah.

GREATHOUSE: Okay sir.

LONARDO: Alright, you'll hear from me.

GREATHOUSE: I'll be waiting to hear from you tomorrow. Give my girlfriend a call and uh I'll hear from you tomorrow, we'll roll from there.

LONARDO: Alright.

GREATHOUSE: That's all we can do.

LONARDO: And then uh if you can get that dollar I'd appreciate it.

GREATHOUSE: Alright.

LONARDO: Otherwise I wouldn't, I swear to God I wouldn't bother you for it.

GREATHOUSE: Well then I'll just go ahead and start moving.

LONARDO: Okay.

GREATHOUSE: Get a few bucks in.

LONARDO: Do whatever you have to.

GREATHOUSE: Well you shoot for tomorrow now.

LONARDO: See I gotta recontact these people.

GREATHOUSE: Okay, now you do understand though?

LONARDO: I understand that now. But see uh (unintelligible) I called 'em back I said look, you know how these people (unintelligible) everything is called off. Rather than go this, and then they say what the fuck this guy setting us up or what?

GREATHOUSE: But I couldn't say nothing on the phone to you.

LONARDO: I know. I ain't goin' to.

(Unintelligible conversation)

GREATHOUSE: Give 'em the figures and give me an answer tomorrow.

LONARDO: Alright.

GREATHOUSE: Okay.

(End of tape)

—

GOVERNMENT EXHIBIT 12B

FEDERAL BUREAU OF INVESTIGATION

(1) Date of transcription 6/6/84

The following is a transcript of a recorded telephone conversation between Clarence Greathouse and Angelo J. Lonardo which took place on May 25, 1984 at Cleveland, Ohio.

C.G. 9-24-84

Investigation on 5/25/84 at Cleveland, Ohio File CV 245A-58-85A by SA Robert A. Fiatal/nkb Date dictated 5/31/84

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency, it and its contents are not to be distributed outside your agency.

CV 245A-58

5/25/84

Clarence Greathouse & Angelo J. Lonardo

(Dial Tone)

(Dialing Sound)

GREATHOUSE: These boys ain't giving me a five minute break today . . . I need complete quiet . . .

(Phone Rings)

OPERATOR: At the tone the time will be 5:36 and 30 seconds.

(Dial Tone)

(Dialing Sound)

(pause)

(Dial Tone)

(Dialing Sound)

(Phone rings)

LONARDO: Hello
GREATHOUSE: Yeah boss.
LONARDO: How you doing?
GREATHOUSE: I'm fine.
LONARDO: I got a call from Peggy . . . do you know what thats all about.
GREATHOUSE: Uh she was just wondering . . . I was just wondering if you were gonna get in touch with me this evening.
LONARDO: Oh yeah.
GREATHOUSE: O'kay.
LONARDO: As a matter of fact I have uh a gentleman friend of mine here now.
GREATHOUSE: O'kay.
LONARDO: And he had some questions to ask you about the trees.
GREATHOUSE: O'kay.

(Unintelligible)

LONARDO: (unintelligible)
GREATHOUSE: No I'm not on the pay phone you want me to go to a pay phone and call you.
LONARDO: Absolutely.
GREATHOUSE: O'kay I'm on my way.
LONARDO: All right.
GREATHOUSE: Bye.

(hangs up phone)

GOVERNMENT EXHIBIT 13B

FEDERAL BUREAU OF INVESTIGATION

(1) Date of transcription 6/6/84

The following is a transcript of a recorded telephone conversation between Clarence Greathouse and Angelo J. Lonardo which took place on May 25, 1984 at Cleveland, Ohio.

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CV 245A-58

5/25/84

Clarence Greathouse & Angelo J. Lonardo

(Dial Tone)

(Background Noises)

GREATHOUSE: (unintelligible) over my ear. Am I on?

DORTON: Uhha.

(Dialing Sound)

(Background Noises)

OPERATOR: If you'd like to make a call please hang up and try again.

(Background Noises)

(Dial Tone)

(Dialing Sound)

(Phone Rings)

LONARDO: Hello

GREATHOUSE: Hello Boss.

LONARDO: Yeah

What's Happening.

GREATHOUSE: It ain't too much . . . we just waiting for you.

LONARDO: All right.

GREATHOUSE: I'm at 362-9350 if you want to call back.

LONARDO: Uh, no no it's o'kay.

GREATHOUSE: O'kay.

LONARDO: Uh o'kay whose gonna bring those trees?

GREATHOUSE: Uhm myself possibly

What would you like?

LONARDO: Well . . . I don't know . . . you think that's a good idea or . . .

GREATHOUSE: Well have my uncle up here to help . . . it helped uh Gerome move my furniture back up . . . you know when my girlfriend and I moved to Kentucky.

LONARDO: Yeah but (unintelligible)

GREATHOUSE: The one that works in the coal mine.

LONARDO: I don't know him.

GREATHOUSE: Yeah I know but he's driven . . . he'll be driving my black bomb.

(pause)

LONARDO: Well . . .

GREATHOUSE: If that's what you want.

LONARDO: No what I thought would be that hmmm you know you'd drive your car up say uh and park behind the hill.

GREATHOUSE: Behind the where?

LONARDO: The Hilton.

GREATHOUSE: O'kay that's on Rockside.
LONARDO: Yeah . . . by you know the breakfast place.
GREATHOUSE: O'kay.
LONARDO: And uh then I'll be in the lobby or something . . .
GREATHOUSE: Yeah.
LONARDO: You can bring the key (phonetic) in and I'll . . .
GREATHOUSE: O'kay.
LONARDO: My friend will be out in his car and I'll just go over and and you know . . .
GREATHOUSE: O'kay that's fine.
LONARDO: You know . . . whatever.
GREATHOUSE: No that sounds real . . . in fact that's fantastic. That sound real good . . . what time?
LONARDO: Huh.
GREATHOUSE: What time?
LONARDO: As soon as possible.
GREATHOUSE: O'kay let's say oh . . . it would take me till at least 8:30 to get there.
LONARDO: 8:30?
GREATHOUSE: Yeah.

(pause)

LONARDO: All right.
GREATHOUSE: O'kay 8:30 sir.
LONARDO: Yeah.
GREATHOUSE: Yeah, bye, bye.

(Hangs up Phone)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR 84-105

JUDGE GEORGE W. WHITE

UNITED STATES OF AMERICA, PLAINTIFF

vs.

WILLIAM BOURJAILY, DEFENDANT

MOTION FOR JUDGMENT OF ACQUITTAL OR A NEW TRIAL

The Defendant, through counsel, hereby moves the Court under rules 29(c) and 33, *Federal Rules of Criminal Procedure*, for an order granting him a judgment of acquittal or a new trial. In support thereof the defendant avers as follows:

1. The Court erred in denying the defendants Motion to Suppress and for the return of illegally seized property.
2. That there is insufficient evidence to support a finding of guilty beyond a reasonable doubt as to the guilty verdict returned herein on either counts one or two.
3. The court erred in finding as a predicate to the admission of considerable prejudicial evidence that a conspiracy existed as between the defendant and his co-defendant in the trial.

4. The defendant was prejudiced, and otherwise victimized, by the admission of considerable testimony that violated both the hearsay rule and his right of confrontation.

5. That even assuming at some point a conspiracy was shown to exist between the defendants on trial, this defendant was nonetheless prejudiced by virtue of the admission of evidence that did not qualify under Rule 802 (d) (2) (E), *Federal Rules of Evidence.*

* * * *

Denied. IT IS SO ORDERED.

GEORGE W. WHITE

12-19-84

UNITED STATES DISTRICT COURT FOR
N. DIST. OF OHIO, EAST. DIVN.

Docket No. CR84-105

UNITED STATES OF AMERICA

vs.

WILLIAM BOURJAILY

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 1-4-85.

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL James R. Willis

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE, ☒ NOT GUILTY

There being a verdict of

☐ NOT GUILTY, Defendant is discharged

☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of conspiracy to distribute and possess cocaine, possession of cocaine with intent to distribute (aiding and abetting)

in violation of Title 21 Sections 846 and 841(a)(1) and Title 18, Section 2, U.S.C.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS on count 1 and FIFTEEN YEARS on count 2 to run concurrently.

IT IS FURTHER ORDERED that the sentence imposed on count 2 is to be followed by a THREE (3) YEAR period of special parole pursuant to Title 21, Section 841 (b)(1)(A), U.S.C.

By: /s/ James F. McCann
Deputy Clerk

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

/s/ George W. White
GEORGE W. WHITE
U.S. District Judge
Date 1/4/85

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR 84-105

UNITED STATES OF AMERICA, PLAINTIFF

vs.

WILLIAM BOURJAILY, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that William Bourjaily, the above-named defendant, hereby appeals to the United States Court of Appeals for the Sixth Circuit, from the verdict rendered, the order made denying his Motion for a New Trial, and the sentence imposed herein on January 4, 1985.

/s/ James R. Willis
JAMES R. WILLIS

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3058

UNITED STATES OF AMERICA, PLAINTIFF/APPELLEE

v.

WILLIAM JOHN BOURJAILY, DEFENDANT-APPELLANT

On Appeal from the United States District Court
for the Northern District of Ohio

Decided and Filed January 15, 1986

Before: LIVELY, Chief Circuit Judge; MARTIN and JONES, Circuit Judges.

BOYCE F. MARTIN, JR., Circuit Judge. William Bourjaily appeals his convictions for conspiracy to distribute and possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1),[1] 21 U.S.C. § 846[2] and

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[1] 21 U.S.C. § 841(a)(1) provides the following:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

Cocaine is a controlled substance.

[2] 21 U.S.C. § 846 provides the following:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 U.S.C. § 2.[3] Bourjaily claims that statements of his codefendants, Angelo Lonardo, should not have been admitted as statements of a co-conspirator as provided by Rule 801(4)(2)(E) of the Federal Rules of Evidence. Because Lonardo exercised his right not to testify at trial, Bourjaily claims that even if Lonardo's statements were admissible under Rule 801(d)(2)(E), allowing the statements into evidence violated his sixth amendment right to confrontation. Bourjaily also claims that the evidence was insufficient to support findings of conspiracy and possession.

The majority of the evidence in this case was presented by testimony of FBI agents; testimony of an FBI informant, Clarence Greathouse; and several recordings of cryptic conversations between Greathouse and the codefendant, Angelo Lonardo. Greathouse testified that he arranged for a transfer of one kilogram of cocaine to Angelo Lonardo to be sold by "people" Lonardo was to select. On May 12, 1984, Greathouse, equipped with a body recorder, met with Lonardo to discuss the possibility of a sale. In this taped conversation, Lonardo indicated that he had talked to "the people" and they were interested. He then stated that the deal would be handled as had been done in the past. Later in the conversation, Lonardo said that he would "try to set some people up." He stated that his contacts did not know that Greathouse was his supplier and Lonardo wanted to keep it that way. Greathouse demanded one-half of the purchase price before delivery and requested that each of Lonardo's buyers purchase at least one-fourth of a kilogram. Lonardo agreed.

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[3] 18 U.S.C. § 2 states the following:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Greathouse testified that on May 17, 1984, he asked Lonardo for money and Lonardo responded that he would get in touch with "some people" and recontact Greathouse. He called Greathouse on May 19 to arrange for delivery of the money and the delivery occurred. Several other conversations occurred in the next few days as the deal was being finalized. All of these conversations were recorded. On May 24, Lonardo met Greathouse at the Sheraton Hopkins Hotel outside of Cleveland. Greathouse told Lonardo that the cocaine had arrived. In a taped conversation, Lonardo said that he would try to contact some people but that he had told them the deal was off because of a purchase price misunderstanding.

On May 25, Lonardo, in a taped telephone conversation, told Greathouse he had a "gentleman friend" present who "had some questions" to ask Greathouse. Lonardo indicated that he wanted Greathouse to call back immediately. The second call was not recorded but FBI agent Dorton listend to both sides of the conversation. Greathouse testified that he discussed how the gentleman was to pay, as well as the quality, the purity, the formation and the clarity of the cocaine. Agent Dorton confirmed that these topics were discussed. Later that day, in a taped conversation, Lonardo told Greathouse to park his car behind the Hilton Hotel and that Lonardo would be waiting for him in the lobby. Lonardo stated, "My friend will be out in his car and I'll just go over and you know."

FBI agents Fiatal and Dorton placed four quarter-kilogram bags of cocaine in a Sheraton laundry bag in Greathouse's car. Greathouse parked at the Hilton, entered and stood next to Lonardo. FBI agents Fiatal and Dorton testified that William Bourjaily was in the parking lot in a white car which was facing away from the hotel. Other FBI agents in a surveillance van stationed in the parking lot prior to Greathouse's arrival had observed Bourjaily drive around the parking lot, stop in different areas and examine the vehicles parked there.

The agents stated that Bourjaily's car was at the end of the parking lot farthest from the hotel entrance when Greathouse arrived.

Greathouse arrived, entered the Hilton and gave Lonardo the keys to his car. Lonardo took the keys, walked to Greathouse's car, circled the car and walked to Bourjaily's car. Lonardo then walked back to Greathouse's car, unlocked the door, reached under the seat and removed the cocaine. As Lonardo neared Greathouse's car, Bourjaily turned his car around in the parking lot and moved to a point near Greathouse's car. Lonardo took the cocaine from the car and walked to Bourjaily's car. At least one FBI agent saw Lonardo hand the package of cocaine to Bourjaily and saw Bourjaily accept it. The FBI agents then arrested Bourjaily and Lonardo and recovered the cocaine from Bourjaily's car. They found, under Bourjaily's passenger seat, a leather bag containing $19,000 in cash. A receipt found in the bag was made out to Bill Bourjaily. They also found $2,000 in the glove compartment.

We believe the trial judge was correct in allowing Lonardo's statements to be admitted as statements of a co-conspirator as provided by Rule 801(d)(2)(E) of the Federal Rules of Evidence, which states:

> **(d) Statements which are not hearsay.** A statement is not hearsay if—
>
> . . . .
>
> **(2) Admission by party-opponent.** The statement is offered against a party and is . . .
>
> (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

We have held that in order to have a co-conspirator's testimony admitted, it must be shown by a preponderance that a conspiracy existed, that the defendant against whom the hearsay is offered was a member of the con-

spiracy, and that the statement in question was made in furtherance of the conspiracy. *United States v. Vinson*, 606 F.2d 149, 152 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); *United States v. Enright*, 579 F.2d 980, 986 (6th Cir. 1978). This determination need not be decided at the time the questionable evidence is offered. Rather, as the trial court here did, the court may wait until the United States' case is complete before making findings and rulings on its admissibility. *Vinson*, 606 F.2d at 153. The statements at issue may be considered by the court in determining whether the *Enright* requirements are satisfied.[4] *Id.* Here the court specifically found that the *Enright* requirements had been satisfied. We find no procedural error.

Substantively, the trial judge did not err in finding that the government had proved by a preponderance of the evidence that the *Enright* requirements were satisfied. Lonardo's conversations with Greathouse establish that Greathouse was to supply the cocaine and Lonardo was to line up buyer-distributors and to obtain partial payment from them. The conspiracy and Bourjaily's membership in it was preponderantly proved by these conversations, by Greathouse's telephone discussion with Lonardo's "friend" about the quality of the cocaine, and Lonardo and Bourjaily's actions in the Hilton parking lot. After talking with Lonardo, Bourjaily pulled his car nearer Greathouse's car so that the cocaine could be transferred by Lonardo easily. Bourjaily then accepted the cocaine from Lonardo. Lonardo's statements were made in furtherance of the conspiracy because they were recorded from conversations between Lonardo and Greathouse in which they planned, negotiated, and organized the transaction.

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[4] The Supreme Court denied certiorari on this issue in *Means v. United States*, —— U.S. ——, 105 S. Ct. 541 (1984). *See also United States v. Martorano*, 561 F.2d 406, 408 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978).

Admission of Lonardo's statements does not violate Bourjaily's sixth amendment right of confrontation, though Bourjaily could not confront or otherwise cross-examine Lonardo because Lonardo exercised his right not to testify. In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Supreme Court held that the defendant's right to confrontation is protected if the hearsay statement sought to be used against the defendant has sufficient indicia of reliability and if the declarant is unavailable. *Id.* at 65-66. The *Roberts* court stated that "reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.* at 66. Rule 801(d)(2)(E) provides that statements of co-conspirators are not hearsay for purposes of the rules. However, these statements are out-of-court assertions offered for their truth "and thus resting for . . . [their] value upon the credibility of the out-of-court asserter." C. McCormick, *Handbook of the Law of Evidence*, § 246 at 584 (1972). These statements are thus traditionally considered hearsay and squarely covered by the *Roberts* requirements. *See* Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. Fla. L. Rev. 207, 229 (1984).

The circuits are split on the analysis to be followed in dealing with co-conspirator's statements.[5] Several circuits have adopted an approach in which co-conspirator statements admitted under Rule 801(d)(2)(E) are analyzed on a case-by-case basis for reliability and availability. *See United States v. DeLuna*, 763 F.2d 897, 909-10 (8th Cir. 1985); *United States v. Ammar*, 714 F.2d 238, 254-57 (3d Cir.), *cert. denied*, 464 U.S. 936 (1983); *United States v. Perez*, 658 F.2d 654, 660 & n.5 (9th Cir. 1981); *United States v. Wright*, 588 F.2d 31, 37-38 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979).

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[5] The Supreme Court denied certiorari in a case presenting this precise issue. *See Sanson v. United States*, —— U.S. ——, 104 S. Ct. 3559 (1984).

We have held that evidence admitted as a co-conspirator's statement under Rule 801(d)(2)(E) automatically satisfies the sixth amendment requirements. *Boone v. Marshall*, 760 F.2d 117, 119 (6th Cir. 1985); *United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984); *United States v. Marks*, 585 F.2d 164, 170 n.5 (6th Cir. 1978); *United States v. McManus*, 560 F.2d 747 (6th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978); *Campbell v. United States*, 415 F.2d 356 (6th Cir. 1969). *Accord United States v. Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982); *United States v. Papia*, 560 F.2d 827, 836 & n.3 (7th Cir. 1977); *Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973). However, none of these cases discuss the implications of the two-pronged test of *Roberts* on our analysis.

In *Fuson v. Jago*, 773 F.2d 55 (6th Cir. 1985), another approach was used which applied *Roberts*. In *Fuson* a separate finding of unavailability was made and the panel held that the 801(d)(2)(E) provision represented a "well established" hearsay exception. *Fuson*, 773 F.2d at 59. Though the *Fuson* Court ultimately found that the statement in question did not fit within the exception, we think the bifurcated analysis is proper and more in accord with the *Roberts* requirements. As implied in *Fuson*, the reliability prong of the *Roberts* analysis is supplied by satisfaction of Rule 801(d)(2)(E), a well-established hearsay exception. Availability must be separately proved. *Accord United States v. Peacock*, 654 F.2d 339, 349-50 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983).

Because we find that Lonardo's statements were properly admitted under Rule 801(d)(2)(E), reliability is proved. Lonardo, the declarant and Bourjaily's codefendant, was unavailable because he refused to testify. In *Mayes v. Sowders*, 621 F.2d 850, 855 (6th Cir.), *cert. denied*, 449 U.S. 922 (1980), we stated:

> A witness is not available for full and effective cross-examination when he or she refuses to testify. *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L.Ed.2d 934 (1965); *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 76 (1968); *Nelson v. O'Neil*, 402 U.S. 622, 91 S. Ct. 1723, 29 L.Ed.2d 222 (1971). This is equally true whether the refusal to testify is predicated on privileg or is punishable as contempt, so long as the refusal to testify is not procured by the defendant. *Douglas v. Alabama*, *supra*, 380 U.S. at 420, 85 S. Ct. at 1077; *Motes v. United States*, 178 U.S. 458, 471, 20 S. Ct. 993, 998, 44 L.Ed. 1150 (1900); *United States v. Mayes*, 512 F.2d 637, 650-52 (6th Cir.), *cert. denied*, 422 U.S. 108, 95 S. Ct. 2629, 45 L.Ed.2d 670 (1975).

621 F.2d at 856. *See Rice v. Marshall*, 709 F.2d 1100, 1102 (6th Cir. 1983), *cert. denied*, 465 U.S. 1034 (1984). Clearly, Lonardo's refusal to testify made him unavailable.

Bourjaily's final claim is that the evidence adduced at trial was insufficient to support a finding by the jury that conspiracy to distribute cocaine and possession of cocaine were proved beyond a reasonable doubt. The standard now generally applied in determining the sufficiency of the evidence at trial is "whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, *reh'g denied*, 444 U.S. 890 (1979); *United States v. Gallo*, 763 F.2d 1504, 1508 (6th Cir. 1985). The essential elements of conspiracy are that the conspiracy was willfully formed, that the defendant willfully became a member of the conspiracy, and that one of the conspirators committed at least one overt act in furtherance of the conspiracy. *United States v. Thompson*, 533 F.2d 1006, 1009 (6th Cir.), *cert. denied*, 429 U.S. 939 (1976). For conviction, Bour-

jaily must have been shown to have agreed to participate in what he knew to be a joint venture to achieve a common goal. *United States v. Warner*, 690 F.2d 545, 549 (6th Cir. 1982); *United States v. Martino*, 664 F.2d 860, 876 (2d Cir. 1981), *cert. denied*, 458 U.S. 1110 (1982). However, actual agreement need not be proved. Drug distribution conspiracies are often "chain" conspiracies such that agreement can be inferred from the interdependence of the enterprise. *Warner*, 690 F.2d at 549; *United States v. Sutherland*, 656 F.2d 1181, 1195-96 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982). One can assume that participants understand that they are participating in a joint enterprise because success is dependent on the success of those from whom they buy and to whom they sell. *Warner*, 690 F.2d at 549; *Martino*, 664 F.2d at 876. Circumstantial evidence is sufficient. *Thompson*, 533 F.2d at 1009.

Viewing the evidence before us in the light most favorable to the United States, *Glasser v. United States*, 315 U.S. 60 (1942), we hold that there was sufficient evidence from which the rational jury member could have found beyond a reasonable doubt that Bourjaily was a willful member of a conspiracy to distribute cocaine and that the accompanying overt acts were committed by the conspirators. The evidence established that Bourjaily took the cocaine from Lonardo in the Hilton parking lot. The additional evidence of Lonardo's actions in lining up buyers, and Lonardo's conversations with Greathouse is supportive of the conspiracy finding. Lonardo called Greathouse so that his "friend" could discuss the deal with him. Greathouse spoke with this "friend" about the quality of the cocaine. Lonardo later said "his friend" would be in the Hilton parking lot. Even if the evidence of Bourjaily taking the cocaine from Lonardo is only evidence of a sale, there is additional evidence from which knowledge of the conspiracy may be inferred. *United States v. Grunsfeld*, 558 F.2d 1231, 1235 (6th Cir. 1977), *cert. denied*, 434 U.S. 872 (1978). *United States v. Mayes*, 512 F.2d 637, 647 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975). Further, one kilogram of cocaine was involved. A large volume of narcotics creates an inference of a conspiracy. *Grunsfeld*, 558 F.2d at 1235; *United States v. Aiken*, 373 F.2d 294, 300 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967).

Likewise, a rational trier of fact could find that possession, a necessary finding for a violation of 21 U.S.C. 841(a)(1), was proved beyond a reasonable doubt. An FBI agent testified that he saw Lonardo give Bourjaily the cocaine and that Bourjaily accepted it. Immediately thereafter, Bourjaily was arrested and the cocaine was found in the passenger portion of his car. Bourjaily's contention that he did not know that the substance was cocaine is meritless in light of the money found in his car, Lonardo's statements, and the phone call Greathouse had with Lonardo's "friend."

We affirm.

SUPREME COURT OF THE UNITED STATES

No. 85-6725

WILLIAM JOHN BOURJAILY, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted limited to the following questions: 1. Whether, in order to admit an alleged co-conspirator's declarations against a defendant under Federal Rule of Evidence 801(d)(2)(E), the court must determine by independent evidence a) that a conspiracy existed, and b) that the declarant and the defendant were members of this conspiracy. 2. Assuming that the court must make these determinations, upon what quantum of independent proof must they be based? 3. Whether, as a requirement for the admission of a co-conspirator's statement against a defendant, the court must assess the circumstances of the case to determine whether the statement carries with it sufficient indicia of reliability.

October 14, 1986

No. 85-6725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM J. BOURJAILY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF FOR PETITIONER

JAMES R. WILLIS
(Counsel of Record)
Suite 610, Bond Court Building
1300 East Ninth Street
Cleveland, OH 44114
(216) 523-1100

JAMES M. SHELLOW
Shellow, Shellow & Glynn, S.C.
222 East Mason Street
Milwaukee, WI 53202
(414) 271-8535

STEPHEN ALLAN SALTZBURG
Professor of Law
University of Virginia
School of Law
Charlottesville, VA 22901
(804) 924-3520
Counsel for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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QUESTIONS PRESENTED

1. Whether, in order to admit an alleged co-conspirator's declarations against a defendant under Federal Rule of Evidence 801 (d)(2)(E), the court must determine by independent evidence a) that a conspiracy existed, and b) that the declarant and the defendant were members of this conspiracy?

2. Assuming that the court must make these determinations, upon what quantum of independent proof must they be based?

3. Whether, as a requirement for the admission of a co-conspirator's statement against a defendant, the court must assess the circumstances of the case to determine whether the statement carries with it sufficient indicia of reliability?

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PROCEEDINGS BELOW

William Bourjaily, the petitioner, was tried and convicted in the United States District Court for the Northern District of Ohio of two offenses, conspiring to possess and distribute cocaine in violation of 21 U.S.C. § 846 and possession with intent to distribute cocaine in violation of 21 U.S.C. § 841 (A)(1).[1] He appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed his convictions on January 15, 1986. *United States* v. *Bourjaily*, 781 F.2d 539 (6th Cir. 1986). Petitioner filed a timely petition for certiorari, and this Court granted the writ on October 14, 1986. ___ U.S. ___, 107 S.Ct. 268 (1986).

JURISDICTION

The United States brought this criminal case in the district court. Petitioner's appeal as of right to the court of appeals was grounded in 28 U.S.C. § 1291. This Court has jurisdiction over his case pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

Federal Rule of Evidence 104 (a), (b):

> (a) Questions of admissibility generally.—Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of the evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the

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[1] Petitioner was sentenced to concurrent prison terms of 15 years and to a three-year special parole term on the possession count.

rules of evidence except those with respect to privilege.

(b) Relevancy conditioned on fact.—When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Federal Rule of Evidence 801 (d)(2)(E):

(d) Statements which are not hearsay.—A statement is not hearsay if—

. . .

(2) Admission by party-opponent.—The statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Federal Rule of Evidence 1101 (d):

. . .

(d) Rules inapplicable.—The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact.—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

STATEMENT OF THE CASE

Petitioner was arrested immediately after a package containing a kilogram of cocaine was placed into his car by a co-defendant, Angelo Lonardo. (J.A. 45-46) When Federal Bureau of Investigation agents seized and searched petitioner's car, they found not only the cocaine but also approximately $20,000 in cash. (J.A. 149)

The only evidence, other than statements made by Lonardo, that implicated petitioner on both the conspiracy and the possession charges was testimony by the FBI agents concerning the arrival of petitioner's car at the parking lot of a Hilton Hotel, Lonardo's removal of the package from the car of a third person (Clarence Greathouse), Lonardo's placement of the package in petitioner's car, and petitioner's arrest and searches incident thereto.

Over petitioner's objection, the government played for the jury tape recordings that it made of conversations between Lonardo and the source of the cocaine, Clarence Greathouse.[2] Greathouse had consented to cooperate with federal agents as part of an agreement that disposed of the government's case against him. (J.A. 7)

In one taped conversation between Greathouse and Lonardo on May 12, 1984, Lonardo indicated that he had talked to "the people" who were interested in selling cocaine and that the deal would be set up as Greathouse and Lonardo had done it in the past. (J.A. 88-89) Lonardo indicated that he would "try to set some people up." (J.A. 94) Lonardo stated that his contacts did not know that Greathouse was the supplier and that he wanted to keep it that way. (J.A. 94) On May 17, Greathouse asked Lonardo for money, and Lonardo telephoned to arrange for delivery on May 19. (J.A. 116-19) Several conversations between the two followed. (J.A. 120-30) On May 24, Greathouse told Lonardo that the cocaine had arrived, and Lonardo reported that he would try to contact some people, but that he had told them the deal was off because of a misunderstanding about the purchase price. (J.A. 135)

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[2] The government taped telephone calls and also equipped Greathouse with a body recorder.

On May 25, Lonardo told Greathouse that he had a "friend" who wanted to ask some questions. (J.A. 19) A subsequent call was not recorded, but Greathouse testified that he discussed various aspects of a cocaine transaction with the friend and that he also spoke to Lonardo during the conversation. (J.A. 25) No evidence was offered as to the identity of the gentleman friend.[3]

Some time later on May 25, Lonardo telephoned Greathouse to arrange for a sale of cocaine. (J.A. 138-40) Greathouse arranged to meet Lonardo at a Hilton Hotel, and Greathouse left the cocaine under the passenger seat of his car. (J.A. 29) Greathouse met Lonardo inside the hotel where Lonardo received the keys to Greathouse's car. Thereafter, Lonardo removed the cocaine from Greathouse's car and carried it to petitioner's car. (J.A. 44) Almost immediately, the FBI agents made their arrests and searches. (J.A. 46).

In arguing to the district judge that the taped conversations should be admissible against petitioner, as well as against Lonardo,[4] the government specifically relied on the substance of the very conversations to which petitioner objected in order to satisfy Fed. R. Evid. 801 (d)(2)(E). (J.A. 71-74) Accepting the government's argument, the district court simply found that the evidence rule was satisfied. (J.A. 75) The court of appeals affirmed,

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[3] The sum of money that Greathouse testified the friend was willing to pay was $15,000 up front, which differed considerably from the amount found in petitioner's car. (J.A. 24)

[4] Any statements by Lonardo would, of course, have been personal admissions, which would have come in against him under Fed. R. Evid. 801 (d)(2)(A). Statements by Greathouse to Lonardo would either have been admissible against Lonardo to explain Lonardo's own admissions or as adoptive admissions by Lonardo under Fed. R. Evid. 801 (d)(2)(B).

specifically relying on the taped conversations to find sufficient evidence for the district judge to have determined that a conspiracy had been proved by a preponderance of the evidence to the judge's satisfaction. 781 F.2d at 542.

SUMMARY OF THE ARGUMENT

In order to satisfy the Confrontation Clause of the Sixth Amendment and Fed. R. Evid. 801 (d)(2)(E), a trial judge must make three findings before permitting out-of-court hearsay statements made by an alleged co-conspirator to be used against a defendant in a criminal case in federal court:[5] first, that there is sufficient independent evidence to prove that a conspiracy existed; second, that the declarant and the defendant were both members of the conspiracy; and third, that any statement was made in furtherance of and during the existence of the conspiracy. In deciding whether or not the government has laid a sufficient predicate for admission of co-conspirator statements, the trial judge must utilize the preponderance of the independent evidence standard with respect to the existence of the conspiracy and the membership therein of the co-conspirator and the defendant.[6]

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[5] The Confrontation Clause would have no applicability in a civil case, but the hearsay analysis would be the same. Fed. R. Evid. 801 (d)(2)(E) does not distinguish between criminal and civil cases. *See, e.g., Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 723 F.2d 238, 260-63 (3d Cir. 1983), *rev'd on other grounds*, ____ U.S. ____, 106 S.Ct. 1348 (1986).

[6] The preponderance standard is the usual standard employed by trial courts in making rulings on preliminary questions of fact relating to evidence issues. It should plainly be permissible for a trial judge to use a higher standard—e.g., to require clear and convincing evidence or proof beyond a reasonable doubt—in making such rulings, and some state courts may require more than a preponderance of the

Assuming that the requisite findings are made and that a statement by a co-conspirator qualifies under the evidence rule for admission against a defendant, petitioner does not contend that in each and every case the court must assess the circumstances of the case to determine whether the statement carries with it sufficient indicia of reliability to satisfy the Confrontation Clause. Rather, petitioner suggests when the hearsay exception for co-conspirator statements,[7] being a long standing exception to the general rule of evidence excluding hearsay statements offered for the truth of the matter stated, is satisfied, the presumption should be that the statements satisfying the exception also satisfy the Confrontation Clause. This presumption should not be conclusive, however. When a defendant who specifically objects on Confrontation Clause grounds and articulates reasons why co-conspirator statements are not only crucial in the case, but also are unusually unreliable, the trial judge should be required to determine whether the statements should, in

evidence. *Cf. Lego* v. *Twomey*, 404 U.S. 477, 489 (1972). Petitioner believes that Fed. R. Evid. 801 (d)(2)(E) requires a uniform approach in federal courts, and that the preponderance standard is appropriate as well as sufficient to satisfy constitutional requirements.

[7] This Court has previously observed that the drafting of Fed. R. Evid. 801 technically defines a co-conspirator statement as not being hearsay rather than as an exception to the hearsay rule as it was treated at common law. *United States* v. *Inadi*, ____ U.S. ____ 106 S.Ct. 1121, 1128 (1986). Whether Rule 801 (d) technically should be called an exemption from or an exception to the hearsay rule cannot be significant for purposes of a constitutional analysis, as this Court recognized in *Inadi:* "Whether such statements are termed exemptions or exceptions, the same Confrontation Clause principles apply." *Id.* at 1128 n.12.

fairness, be used against a defendant who has no opportunity to cross-examine the declarant.[8]

Applying these principles to the facts of his case, petitioner asks the Court to hold that the lower courts used an incorrect approach to determining the admissibility of an alleged co-conspirator's statements and either to hold that the statements were improperly admitted or to vacate and remand the case for further proceedings pursuant to the correct approach.

ARGUMENT

I. IN ORDER TO ADMIT AN ALLEGED CO-CONSPIRATOR'S DECLARATIONS AGAINST A DEFENDANT UNDER FEDERAL RULE OF EVIDENCE 801 (d)(2)(E), THE COURT MUST DETERMINE BY INDEPENDENT EVIDENCE A) THAT A CONSPIRACY EXISTED, AND B) THAT THE DECLARANT AND THE DEFENDANT WERE MEMBERS OF THIS CONSPIRACY

A. The Decision Whether To Admit Co-Conspirator Declarations Requires A Trial Judge To Engage In Preliminary Fact Finding Under Fed. R. Evid. 104 (a)

Federal Rule of Evidence 104 provides in relevant part as follows:

> (a) Questions of admissibility generally.—Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of the evidence shall be determined by the court, subject to the provisions of subdivision

[8] If the defendant has an opportunity for cross-examination, the Confrontation Clause problem will disappear under this Court's holdings in *California* v. *Green*, 399 U.S. 149 (1970); *Nelson* v. *O'Neil*, 402 U.S. 622 (1971).

> (b). In making its determination it is not bound by the rules of evidence except those with respect to privilege.

There can be no doubt that the decision whether a statement by a co-conspirator fits within Fed. R. Evid. 801 (d)(2)(E) is a determination that the trial judge must make under subdivision (a) of Rule 104. Rule 801 establishes conditions precedent to the admission of evidence that otherwise would be excluded under Fed. R. Evid. 802 as hearsay, and the determination of whether those conditions have been satisfied involves preliminary questions concerning "the admissibility of evidence." The Advisory Committee's Note accompanying Rule 104 (a) explains its scope. It states that "[t]he applicability of a particular rule of evidence often depends upon the exist ence of a condition," and "[t]o the extent that these inquiries are factual, the judge acts as a trier of fact." 56 F.R.D. 183, 197 (1972). The Note specifically gives as one example the determination whether a hearsay statement qualifies as a declaration against interest, which is a decision "made by the judge." *Id.* The same reasoning applies to fact finding under Fed. R. Evid. 801 (d)(2)(E).

Rule 104 (a) merely codifies the common law approach toward separating the functions of judge and jury. *See* McCormick on Evidence 139 (3d. E. Cleary ed. 1984); E. Morgan, Basic Problems of Evidence 45-50 (1962).

> "Entrusting the judge—rather than the jury—with the responsibility of determining certain factual questions serves a threefold purpose: First, it prevents the submission of highly technical evidentiary questions to a group of laymen ill equipped 'to do legal reasoning . . . .' Second, it insulates the jurors from the kinds of evidence that they may be unable to evaluate fairly; trepidations as to the ability of jurors fairly to evaluate certain kinds of evidence may give rise to various exclusionary rules. . . . Finally, resolution of the preliminary factual question by the judge may be necessary to preserve and protect the

> very interest sought to be furthered by the suppression of certain evidence."[9]

It is vital that the trial judge make the preliminary determination of facts necessary to evaluating the admissibility of statements under Fed. R. Evid. 801 (d)(2)(E). Jurors are untrained in the hearsay rule and unfamiliar with the concepts that underlie the co-conspirator's exception to or exemption from the general ban on hearsay evidence. The task falls naturally to the judge under Fed. R. Evid. 104 (a).

B. The Trial Judge Must Determine That A Conspiracy Existed And That The Declarant And The Defendant Were Members Of The Conspiracy As A Condition Of Admitting Evidence Of A Co-Conspirator's Statement Under Fed. R. Evid. 801 (d)(2)(E)

The showing required by a party seeking to rely upon Fed. R. Evid. 801 (d)(2)(E) is clearly set forth in the rule: the party must demonstrate that "[t]he [co-conspirator] statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Two findings—first, that a conspiracy is proved and, second, that the participation of both the declarant and the defendant against whom a co-conspirator's statement is offered also is proved—are necessarily required under the rule. Fed. R. Evid. 801 (d)(2)(E) imposes these requirements in three distinct ways: 1) The rule mandates that the statement

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[9] Saltzburg, Standards of Proof and Preliminary Questons of Fact, 27 Stan. L. Rev. 271 n.2 (1975). *See also* Maguire & Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392 (1927); Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165 (1929).

offered must be "by a co-conspirator of a party," and this mandate cannot be satisfied unless a conspiracy in which both the declarant and the defendant participated is proved. 2) The rule requires proof that the statement was made during the course of *the* conspiracy in which the co-conspirator and the party were involved. 3) The rule requires the offering party to prove that the co-conspirator's statement was in furtherance of *the* same conspiracy. The second and third requirements, therefore, signify also that the proponent of a co-conspirator's statements must prove a conspiracy that includes both the declarant and the defendant.

The two findings necessitated by Fed. R. Evid. 801 (d)(2)(E) are of constitutional as well as of evidentiary dimensions. Unless the requisite proof of conspiracy and participation is offered, there would be no acceptable rationale for admitting a co-conspirator's statements against a defendant. Admission of statements that are neither reliable nor fairly attributable to a party under a notion of vicarious responsibility would violate the Confrontation Clause.

Most hearsay exceptions rest upon a foundation of necessity and reliability, and reliability is the most important factor in the formulation of exceptions, as the Advisory Committee on the Federal Rules of Evidence recognized. The Advisory Committee's Note to Fed. R. Evid. 803 states that "[t]he present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available." 56 F.R.D. at 303. The Notes accompanying both Rules 803 and 804 attempt to explain why the various exceptions are defensible under a reliability analysis. 56

F.R.D. at 303-20, 322-28. Several of the rules themselves make particular reference to reliability or trustworthiness. For example, the business records exception, Fed. R. Evid. 803 (6), and the public records exception, Fed. R. Evid. 803 (8), include clauses providing respectively that hearsay falling within these exceptions is admissible "unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness" and "unless the sources of information or other circumstances indicate lack of trustworthiness." Reliability or trustworthiness is also the linchpin of the two residual exceptions, Fed. R. Evid. 803(24) and 804 (b)(5).

By way of contrast, the admissions exception or exemption is not generally justified on reliability grounds. As the Advisory Committee's Note to Rule 801 explained, "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule." 56 F.R.D. at 297. The Note categorically states that "[n]o guarantee of trustworthiness is required in the case of an admission." *Id.*

Attempts have been made to argue that statements that meet the requirements of the co-conspirator's exception are sufficiently reliable as a general proposition to be admitted.[10] But it is well established that the primary justification for admission of one co-conspirator's statements against another co-conspirator is premised on an

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[10] *See, e.g.*, Model Code of Evidence 251 (1942); R. Lempert & S. Saltzburg, A Modern Approach to Evidence 395 (2d ed. 1982). But these arguments have been criticized. *E.g.*, R. Lempert & S. Saltzburg, *supra*, at 395-96.

agency principle. The Advisory Committee's Note to Rule 801 recognized this, even as it observed that "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." 56 F.R.D. at 299.

Whether admissibility of co-conspirator's statements is justified exclusively on an agency theory or on this theory combined with a reliability argument, it is clear that, unless the conspiracy and the participation of the declarant and the defendant are proved, there can be no justification for admission of any given statement. There can be no agency if there is no common venture, and any reliability argument fails where a co-conspirator's statements were not in aid of a common undertaking with the defendant against whom the statements are offered.

This Court has implicitly recognized the logical force of this argument in *Lutwak* v. *United States*, 344 U.S. 604 (1953), a prosecution for conspiracy to defraud the United States and to circumvent the immigration laws by obtaining illegal entry of aliens as spouses of veterans. The Court found that acts that occur after a conspiracy has ended may be admitted as relevant evidence, but that statements require different treatment. *Id.* at 617.

> "Declarations stand on a different footing. Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party. *Clune* v. *United States*, 159 U.S. 590. See *United States* v. *Gooding* (U.S.) 12 Wheat 460, 468-70. But such declarations can be used against the co-conspirator only when made in furtherance of the conspiracy. *Fiswick* v. *United States*, 329 U.S. 211, 217; *Logan* v. *United States*, 144 U.S. 263, 308, 309. There can be no furtherance of a conspiracy that has ended. Therefore, the declarations of a conspirator do not bind the co-conspirator if made after the conspiracy has ended. That is the teaching of *Krulewitch* v. *United States*, 336 U.S. 440, and *Fiswick* v. *United States*, 329 U.S. 211, both supra. Those cases dealt only with the declarations of one conspirator after the conspiracy had ended. . . ."

Id. at 617-18.

If statements by one former co-conspirator may not be admitted against a defendant after the conspiracy has ended, certainly statements made by one who has never been shown to be a co-conspirator are not admissible. This Court's opinions and the decisions of every circuit[11] that has addressed the question require proof that there was a conspiracy and that the co-conspirator whose statement is offered and the defendant against whom it is offered were members of that conspiracy.

C. The Trial Judge Also Must Determine That A Co-Conspirator's Statements Were Made During And In Furtherance Of A Conspiracy Before Admitting The Statements Against A Defendant

The final preliminary decision that the trial judge must make under Fed. R. Evid. 801 (d)(2)(E) is that statements made by a co-conspirator and offered against a defendant were made during the conspiracy and were in furtherance of the conspiracy. This is evident on the face of the rule and it has been accepted in this Court's decisions, as the quotation from *Lutwak*, *supra*, clearly demonstrates.

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[11] There has been some difference of opinion among the circuits as to the standard of proof that the trial judge must employ, but the basic proposition set forth here has been accepted by all of the circuits. The decisions are set forth in the discussion of the appropriate standard of proof, *infra*, at 20-23.

Although this point might appear to be outside the scope of the questions presented for review, petitioner briefly mentions this aspect of the trial judge's function because it is important to the second question presented, which is what quantum of independent proof is required to support a preliminary finding by the judge.

II. THE GOVERNMENT MUST PERSUADE THE TRIAL JUDGE BY A PREPONDERANCE OF THE INDEPENDENT EVIDENCE THAT IT HAS MET THE REQUIREMENTS FOR ADMISSION OF A CO-CONSPIRATOR'S STATEMENTS AGAINST A CRIMINAL DEFENDANT

A. This Court Has Declared That There Must Be Proof *Aliunde* Of Conspiracy

In *Glasser* v. *United States*, 315 U.S. 60 (1942), this Court addressed the foundation that must be laid before a co-conspirator's statement is admissible against another defendant. The discussion in *Glasser* arose in the context of a defendant's claim that he was denied the adequate and constitutionally guaranteed assistance of counsel in a prosecution alleging corruption on the part of Assistant United States Attorneys. One lawyer, Stewart, had been retained by Glasser before Stewart also was appointed by the trial judge to represent a co-defendant, Kretske. Glasser complained that Stewart did not object to the admission of statements made by Kretske which implicated Glasser, either by name or by nickname. This Court rejected the government's argument that Glasser was not harmed by counsel's failure to object.

> "Glasser contends that such statements constituted inadmissible hearsay as to him and that Stewart forewent this obvious objection lest an objection on behalf of Glasser alone leave the jury the impression that the testimony was true as to Kretske. The government attacks this argument as unsound, and,

> relying on the doctrine that the declarations of one conspirator in furtherance of the objects of the conspiracy made to a third party are admissible against his co-conspirators, *Logan* v. *United States*, 144 U.S. 263, contends that the declarations of Kretske were admissible against Glasser and hence no prejudice could arise from Stewart's failure to object. However, such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. *Minner* v. *United States* (CCA 10th) 57 F.2d 506; and see *Nudd* v. *Burrows*, 91 U.S. 426. Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence."

Id. at 73-75. The conspirator statements quoted by the Court specifically made reference to Glasser or to his nickname "Red."[12] After quoting various statements, the Court proceeded to examine the proof *aliunde*.

In *United States* v. *Nixon*, 418 U.S. 683, 701 (1974), the Court stated that "[d]eclarations by one defendant may also be admissible against other defendants upon a sufficient showing, by *independent evidence*, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy."[13] The circuits have uniformly read *Glasser* and Fed. R. Evid. 801 (d)(2)(E) as requiring that independent evidence of conspiracy must be produced.[14]

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[12] The Court quoted the specifics of these statements. 315 U.S. at 73 n.5.

[13] Footnote omitted; emphasis added.

[14] As was the case with the findings that the trial judge must make, the circuits are in agreement that there must be independent evidence of conspiracy. They disagree, as the cases cited, *infra* at 20-23, will demonstrate, to a very minor extent on the statement of the standard that the judge must employ in making the required findings and on whether the conspirator statements may themselves be used as evidence of the conspiracy when the judge makes findings.

B. The Government Must Prove To The Trial Judge By A Preponderance Of The Evidence That The Requirements Of Rule 801 (d)(2)(E) Have Been Satisfied

Nothing in the Federal Rules of Evidence purports to set forth the burden of persuasion that proponents of evidence must satisfy when confronted with an objection to the admissibility of their evidence based upon an exclusionary rule or that parties or witnesses claiming a privilege must satisfy. The absence of any provision has compelled courts to look to common law approaches and to pre-Federal Rules of Evidence decisions in deciding what standard to use for a variety of fact finding associated with implementation of some of the most important and frequently invoked evidence rules—e.g., various exceptions to the hearsay rule,[15] the rule limiting expert reliance on facts or data not otherwise admissible in evidence to those reasonably relied upon,[16] or a claim of attorney-client, spousal or another common law privilege.[17] The traditional rule, recognized by this Court as such, is that the party who claims the benefit of an exception to an exclusionary rule must prove to the satisfaction of the trial judge that the exception applies while the claimant of a privilege must justify the claim by the same evidentiary standard.

In *Lego* v. *Twomey*, 404 U.S. 477 (1972), the Court addressed the question of the standard that the prosecution must satisfy to prove voluntariness of a confession. Although the petitioner, a defendant convicted in state court, argued that the standard should be proof beyond a

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[15] E.g., Fed. R. Evid. 803 (2) (exited utterance); Fed. R. Evid. 804 (b)(3) (declaration against interest).

[16] Fed. R. Evid. 703.

[17] Fed. R. Evid. 501.

reasonable doubt, the Court held that the preponderance of the evidence standard was adequate. *Lego* arose as a result of this Court's decision in *Jackson* v. *Denno*, 378 U.S. 368 (1964), which required a judicial determination of voluntariness prior to the admission of a confession.

In its *Lego* opinion, the Court explained the justification for the requirement of judicial screening of confessions in *Jackson:* "Precisely because confessions of guilt, whether coerced or freely given, may be truthful and potent evidence, we did not believe that a jury could be called upon to ignore the probative value of a truthful but coerced confession; it was also likely, we thought, that in judging voluntariness itself the jury would be influenced by the reliability of a confession it considered an accurate account of the facts." *Id.* at 483. The Court assumed as have most courts, that the usual standard for preliminary fact finding was the preponderance standard. It reasoned, with respect to *Jackson*, that "the then-established duty to determine voluntariness had not been framed in terms of a burden of proof," but that "[w]e could fairly assume then, as we can now, that a judge would admit into evidence only those confessions that he reliably found, at least by a preponderance of the evidence, had been made voluntarily." *Id.* at 484.

Lego was decided before this Court submitted the proposed Federal Rules of Evidence to the Congress. While the proposed rules were pending before Congress, the Court decided *United States* v. *Matlock*, 415 U.S. 164 (1974), holding that the government must prove voluntary consent to a search by a preponderance of the evidence. *Id.* at 177. It stated that "the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence." *Id.* at 177 n.14 (citing *Lego*). The Court reaffirmed *Lego* in *Colorado*

v. *Connelly*, ___ U.S. ___, 107 S.Ct. 515 (1986), as it held that the prosecution satisfies its burden of proving a waiver of the privilege against self-incrimination by meeting the preponderance of the evidence standard.

That the Court assumed the preponderance burden to be the usual burden in preliminary fact finding relating to evidence issues is demonstrated by the language in *Lego* that rejected the petitioner's argument that something more than the preponderance standard was needed when a confession was challenged on constitutional grounds: "But, from our experience over this period of time no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence. Petitioner offers nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard." 404 U.S. at 488.

It is obviously true that the Court addressed in both *Lego* and *Matlock* the standard to be used for constitutional questions. Thus, neither case can be said to hold that the preponderance standard is required for non-constitutional rulings. *Matlock* indicates, however, that the Court treated a suppression hearing as involving a preliminary question to be decided under Rule 104 (a), the same rule that governs admissibility of co-conspirator statements. 415 U.S. at 173-74.

There is strong support in logic as well as in the assumptions of courts[18] that the preponderance of the evidence standard should be employed for preliminary

[18] Distinguished commentators have made the same assumption. *See, e.g.*, 1 J. Wigmore, Evidence in Trials at the Common Law §17, at 770 (Tillers rev. 1983). *See also* 1 Wigmore §216, at 717 & n.4 (3d ed. 1940).

fact finding associated with the admission and exclusion of evidence. Rules like the hearsay rule are designed to exclude evidence that is deemed so unreliable that it is more likely to inhibit than to enhance a trier of fact's ability to reach a correct result. The party claiming an exception to the hearsay rule must bear a burden of showing that, at a minimum, the reliability or agency principles that support the exception are present. Otherwise, there is a greater chance that the evidence will have the harmful effects which underlie the rule of exclusion than there is that the evidence will increase the reliability of the judgment.[19]

Use of a standard lower than the preponderance standard would raise Confrontation Clause problems, since prosecutors would be permitted to rely upon out-of-court statements for their truth even after a trial judge determined that it is more likely than not that such statements are so unreliable or lacking in terms of evidence of agency that they could not pass muster under a hearsay analysis. The preponderance of the evidence standard assures that hearsay admitted under Fed. R. Evid. 801 (d)(2)(E) will more likely than not satisfy the minimum requirements for admission under the rule and under the Confrontation Clause, irrespective of whether these requirements are

[19] It should be noted that a defendant who claims the benefit of a hearsay exception also must demonstrate by a preponderance of the evidence that the requirements of the exception have been satisfied. Nothing in the argument made herein favors or disfavors defendants vis-a-vis the government with respect to evidence issues. The even-handed point that supports the argument is that evidence that cannot be shown, even by the slightest margin, to be more likely than not to fit within an exception to an exclusionary rule is by definition as likely to retard as to enhance the proceedings. Thus, it should be excluded.

thought to be grounded in notions of reliability or agency or in both.

C. The Government Must Prove The Existence Of A Conspiracy And The Membership Of The Declarant And The Defendant By A Preponderance Of The Independent Evidence[20]

When this Court's analysis in *Glasser* and *Nixon*, on the one hand, is combined with its adoption of the preponderance of the evidence standard in *Lego* and *Matlock*, on the other hand, a proper, fair and even-handed standard to preliminary fact finding with respect to co-conspirator statements emerges. The standard requires that the government, in order to use a co-conspirator's statements against a criminal defendant, must satisfy the trial judge by a preponderance of the independent evidence that there was a conspiracy and that the co-conspirator and the defendant were participants therein.[21]

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[20] *I.e.*, the evidence *aliunde* in the words of *Glasser, supra*.

[21] Before the enactment of the Federal Rules of Evidence, this Court never specifically addressed the burden of persuasion with respect to conspirator statements. *Glasser, supra*, required independent evidence, but it did not focus on the amount of such evidence that was required. In several decisions, the Court assumed that whatever standard applied had been satisfied. *See, e.g., Nudd* v. *Burrows*, 91 U.S. 426, 438 (1875) (bill of exceptions did not indicate "[w]hat proof had been given of the alleged concert and conspiracy on the part of the defendants, when the declarations of Emmons were offered to be proved," and "it is to be presumed it was sufficient to lay the proper foundation as to them for the introduction of the evidence"); *Wilborg* v. *United States*, 163 U.S. 632, 657-58 (1896) (Court assumed that a secret combination had been proved and that declarations of those engaged in it were admissible against participants). In dictum in *United States* v. *Nixon*, 418 U.S. 683, 701 n.14 (1974), the Court stated that "[a]s a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question

Most of the circuits apply this standard or one that closely approximates the standard as articulated by petitioner.[22] The cited decisions indicate that seven circuits

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to the jury."

The standard that petitioner advocates requires the preponderance finding to be based upon independent evidence only with respect to existence of the conspiracy and membership therein. The discussion, *infra*, at 25-26, explains why the statements themselves are appropriately considered with respect to other preliminary fact finding that is done in connection with Fed. R. Evid. 801 (d)(2)(E).

[22] *United States* v. *Jackson*, 627 F.2d 1198 (D.C. Cir. 1980) (substantial independent evidence required); *United States* v. *Martorano*, 557 F.2d 1 (1st Cir.), *reh'g denied*, 561 F.2d 406 (1977), *cert. denied*, 435 U.S. 922 (1978) (preponderance standard, but judge may consider the statement seeking admission which ordinarily is to be given little weight); *United States* v. *Mastropieri*, 685 F.2d 776 (2d Cir.), *cert. denied*, 459 U.S. 945 (1982) (preponderance of independent evidence required); *United States* v. *Ammar*, 714 F.2d 238 (3d Cir.), *cert denied*, 464 U.S. 936 (1983) (preponderance of independent evidence required); *United States* v. *Portsmouth Paving Corp.*, 694 F.2d 313 (4th Cir. 1982) (fair preponderance of independent evidence required); *United States* v. *James*, 590 F.2d 575 (5th Cir.) (en banc), *modifying*, 576 F.2d 1121 (1978), *cert. denied*, 442 U.S. 917 (1979) (preponderance of independent evidence required); *United States* v. *Arnott*, 704 F.2d 322 (6th Cir.), *cert. denied*, 464 U.S. 948 (1983) (preponderance of evidence, but trial judge may consider statements seeking admission); *United States* v. *Santiago*, 582 F.2d 1128 (7th Cir. 1978) (preponderance of evidence, but reserving judgment as to whether statements seeking admission may be used); *United States* v. *Bell*, 573 F.2d 1040 (8th Cir. 1978) (fair preponderance of the independent evidence); *United States* v. *Rabb*, 752 F.2d 1320 (9th Cir. 1984), *cert. denied*, 471 U.S. 1019 (1985) (reaffirming prima facie evidence approach, but stating that government must produce substantial independent evidence of conspiracy to satisfy test); *United States* v. *Andrews*, 585 F.2d 961 (10th Cir. 1978) (preponderance of independent evidence required); *United States* v. *Salisbury*, 662 F.2d 738 (11th Cir. 1981), *cert. denied*, 457 U.S. 1017 (1982) (preponderance of the independent evidence).

require the government to prove the conspiracy and membership therein, two of the required elements of Rule 801 (d)(2)(E), by a preponderance of the independent evidence.[23] Two other circuits follow this approach but permit consideration of the co-conspirator statements to which objection is made in analyzing whether the government has met the requirements of the rule.[24] One circuit has left open the question whether the statements themselves may be considered.[25] Ten circuits, then, agree on the preponderance of the evidence approach. Seven agree that the evidence of conspiracy and membership should be assessed independently of the challenged co-conspirator statements. Another[26] would not exclude consideration of the challenged statements, but ordinarily would require trial judges to give the statements only slight weight. The two circuits that do not use the preponderance of the evidence test impose a substantial independent evidence requirement on the government,[27] although it is difficult to tell whether this is more or less demanding than the preponderance standard.

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[23] See cases cited in note 22, *supra*, from the Second, Third, Fourth, Fifth, Eighth, Tenth and Eleventh Circuits.

[24] See cases cited in note 22, *supra*, from the First and Sixth Circuits.

[25] See case cited in note 22, *supra*, from the Seventh Circuit.

[26] See case cited in note 22, *supra*, from the First Circuit.

[27] See cases cited in note 22, *supra*, from the District of Columbia and Ninth Circuits. At one time the Ninth Circuit might have distinguished substantial independent evidence from prima facie evidence, but it has now abandoned the distinction. *See United States* v. *Fleishman*, 684 F.2d 1329 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982); *United States* v. *Silverman*, 771 F.2d 1193 (9th Cir. 1985); *United States* v. *Huber*, 772 F.2d 585 (9th Cir. 1985); *United States* v. *Rabb*, 752 F.2d 1320 (9th Cir. 1984), *cert. denied*, 471 U.S. 1019 (1985).

There is an undeniable division of authority as to the proper approach to co-conspirator statements, but that division is not as great as the agreement among the circuits that the preponderance of the evidence standard should be used (ten circuits) and that only independent evidence should be considered with respect to conspiracy and membership (nine circuits). In view of the extensive agreement, two related issues present themselves: Is the preponderance of the evidence standard that has been so widely adopted preferable to the other standards? And, is the limitation placed upon a trial judge to consider only the independent evidence in deciding whether conspiracy and membership have been demonstrated the most persuasive and defensible approach to co-conspirator statements when preliminary findings of fact must be made under Rule 801 (d)(2)(E)?

Petitioner submits that an affirmative answer to both questions provides a clear, workable, and even-handed rule that has proved over the years it has been employed that it works to protect the interests of both sides in a federal criminal prosecution. Affirmative answers will promote consistency and predictability in the district and circuit courts and will require only the smallest change in the approach of a small minority of lower federal courts. Affirmative answers are also consistent with this Court's historic approach to co-conspirator statements.[28]

First, petitioner urges this Court to declare that the overwhelming majority of circuit courts have correctly utilized the preponderance standard in making admissibility decisions under Fed. R. Evid. 104 (a) and

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[28] Like the Advisory Committee, this Court has resisted efforts to expand the scope of the co-conspirator's exception to the hearsay rule. *See Wong Sun* v. *United States*, 371 U.S. 471, 490 (1963).

Fed. R. Evid. 801 (d)(2)(E). The preponderance standard, as noted above, has been assumed by this Court, other courts, and commentators to be the appropriate standard for most preliminary factual issues raised when evidence is offered and objection is made. Under a the prima facie evidence standard,[29] or the virtually identical substantial evidence standard, trial judges and trial lawyers have little, if any, guidance as to how much evidence is substantial. The preponderance standard has worked well, as this Court observed in *Lego*. It assures that evidence is more likely than not reliable or satisfactory and therefore supports admission. Some commentators have urged that a beyond a reasonable doubt test is preferable.[30] Others have defended the traditional preponderance standard.[31] Petitioner submits that the overwhelming majority of circuits have correctly interpreted Fed. R. Evid. 104 (a) and Fed. R. Evid. 801 (d)(2)(E) as adopting the same preponderance standard that has traditionally been used in preliminary fact finding. That standard strikes a fair balance between the government's interest in offering co-conspirator statements and the defendant's interest in protection against unwarranted admission of another's statements on either an agency or a reliability theory.

Assuming that the preponderance of the evidence is the correct standard, petitioner next asks this Court to find that the vast majority of the circuits which have adhered to *Glasser* and have required trial judges to find a conspiracy and membership therein on the basis of independent

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[29] There is substantial confusion as to what exactly a prima facie showing would be. *See* S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 729-32 (4th ed. 1986).

[30] *See* 1 Weinstein's Evidence § 104[05], at 104-43.

[31] Support for this balance can be found in S. Saltzburg & K. Redden, *supra* note 29, at 732-33; Saltzburg, *supra* note 9, at 302-04.

evidence, not by relying upon the challenged co-conspirator statements, are correct. No court has joined the Sixth Circuit in holding that the very statements challenged under Rule 801 (d)(2)(E) may furnish the primary support for their admissibility, as occurred in the instant case. Petitioner submits that the Sixth Circuit has adopted an approach that ignores the derivation of the co-conspirator rule and the conscious decision that was made not to expand it when the Federal Rules of Evidence were enacted.

Before turning to the background of Rule 801 (d)(2)(E), petitioner points out that the circuits that have held that only independent evidence may be considered when a trial judge decides whether a conspiracy has been proved and the co-conspirator and the defendant were participants therein have not concluded that the conspirator statements must be disregarded in deciding whether they were made during and in furtherance of the conspiracy.[32] Once the trial judge has found the requisite conspiracy and participation by a preponderance of the evidence, the judge may—in fact, often must—consider the substance of the challenged statements in making a determination whether they were in furtherance of a conspiracy and even whether they were made during a conspiracy.[33] The

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[32] The majority of circuits have held that proof of conspiracy and membership therein by the preponderance of the independent evidence establishes the existence of the kind of relationship between the declarant and the defendant that warrants examination of the contents of the statements to see whether they were indeed part of the conspiratorial venture that the trial judge has found.

[33] As petitioner observes in note 32, *supra*, the trial judge is also justified in examining the contents of the statement once it has been established for purposes of preliminary fact finding that the declarant and the defendant were members of the same conspiracy. This is

judge must do so because statements that are "casual conversation" are not admissible under the rule.[34] Without examining the substance of the statements, the trial judge could not reasonably determine their nature. Similarly, if a claim is made that a statement actually terminated a conspiracy or one person's participation, the trial judge could not decide whether that communication was during (or in furtherance of) unless the contents could be examined. Thus, it must be true that the trial judge may examine the challenged statements to make the judgment whether a statement was made in furtherance of and during a conspiracy.

But, the fact finding concerning the existence of a conspiracy and the participation of the co-conspirator and a defendant raises different concerns. This court stated in *Glasser*, 315 U.S. at 75, that declarations by a co-conspirator may only be admitted against a defendant who was not present when they were made, only if there is proof *aliunde* that both are connected with the conspiracy. "Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence." Lower courts have also been concerned about boot-strapping.[35] In light of *Glasser*, the argument that the conspirator's statements should not themselves be considered part of the proof *aliunde* might be conclusive. But, it is called into question by Fed. Rule Evid. 104 (a) and Fed. R. Evid. 1101 (d)(1),

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similar to an agency analysis in a respondant superior case. Unless agency is shown, an agent's acts may not be considered against a principal. Once agency is shown, the acts may be examined to see whether they fall within the scope of the agency.

[34] *See, e.g., United States* v. *Lieberman*, 637 F.2d 95 (2d Cir. 1980).

[35] *See, e.g., United States* v. *DeFillippo*, 590 F.2d 1228 (2d Cir.), *cert. denied*, 442 U.S. 920 (1979).

which respectively provide that "[i]n making its determination [on a preliminary question of fact] it [the court] is not bound by the rules of evidence except those with respect to privilege," and "[t]he rules (other than with respect to privileges) do not apply in the following situations: (1) Preliminary questions of fact.—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104."

Were these rules read without regard to the drafters' intent and without reference to the law that preceded them, it surely would seem that the rules permit the trial judge to rely upon any available evidence in making any preliminary finding of fact. The intent of the drafters in these rules was identified by this Court in *United States* v. *Matlock*, 415 U.S. at 173. The Court noted that there has traditionally been a different evidentiary approach to preliminary findings of fact and to trial on the merits, and wrote as follows: "That the same rules of evidence governing criminal jury trials was not generally thought to govern hearings before a judge to determine evidentiary questions was confirmed . . . when the Court transmitted to Congress the proposed Federal Rules of Evidence. . . . The rules in this respect reflect the general views of various authorities on evidence. . . . ." *Id.* at 173-74. The Court added that "[t]here is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel." *Id.* at 175.

The Advisory Committee's Note to Rule 104 (a), 56 F.R.D. at 197, supports the description in *Matlock* of

Rule 104 (a). Generally speaking, Rules 104 (a) and 1101 (d)(1) provide the trial judge with flexibility in making preliminary rulings. Such flexibility is important, for, as the Advisory Committee noted, in some cases the trial judge must consider the challenged evidence in order to make a ruling. The example offered by the Advisory Committee is that "the content of an asserted declaration against interest must be considered in ruling whether it is against interest." 56 F.R.D. at 197. Petitioner does not challenge this argument; in fact, the point made earlier concerning the need to examine a co-conspirator's statement in order to decide whether it was in furtherance of conspiracy is very similar.

Petitioner contends, however, that neither Rule 104 (a) nor Rule 1101 (d)(1) was intended to change the basic rule that a conspiracy and membership therein must be demonstrated by sufficient independent evidence before the trial judge examines a statement in order to determine whether it was made during and in furtherance of the conspiracy. "[T]he important thing . . . is that Rule 104 (a) does not define what the preliminary question of fact is that the Trial Court must decide. In some jurisdictions that have used the preponderance of the evidence standard—e.g., the Second and Third Circuits—the Courts of Appeals have held that one part of the preliminary question is whether a conspiracy that included the declarant and the defendant against whom a statement is offered has been demonstrated to exist on the basis of evidence independent of the declarant's hearsay statements."[36]

Because the more important, if not the exclusive, justification for admitting co-conspirator statements involves an agency principle, this Court in *Glasser, supra*, and the

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[36] S. Saltzburg & K. Redden, *supra* note 29, at 735.

majority of the circuits following the adoption of the Federal Rules of Evidence have determined that it is essential, if a fair trial is to be assured, that there be sufficient evidence of conspiracy and membership offered before the party relying on a co-conspirator's statement may use it against someone other than the declarant. Without independent evidence, it is possible that a co-conspirator's statements will be introduced primarily on the basis that someone outside of court mentioned a defendant and made allegations against that defendant, without any guarantee of reliability or any credible proof of agency. Moreover, the same statements that are used to boostrap into evidence hearsay statements against a defendant may be damning evidence that will be used to hold the defendant liable, under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), for acts committed by others.

Without independent evidence of conspiracy that is sufficient to support the preponderance of the evidence standard (i.e., to make it more likely than not that there was a conspiracy involving the declarant and the defendant), petitioner submits that there is no justification for admitting a statement; neither agency nor reliability has been demonstrated. Last term this Court held in *Lee* v. *Illinois*, ___ U.S. ___, 106 S.Ct. 2056 (1986), that a defendant's confrontation right was denied when a co-defendant's confession was used against him. The Court wrote that "[w]e need not address the question of Thomas' availability, for we hold that Thomas' statement, as the confession of an accomplice, was presumptively unreliable and that it did not bear sufficient independent 'indicia of reliability' to overcome that presumption." 106 S.Ct. 2061. A statement by a co-conspirator implicating a defendant is equally damning and traditionally has been viewed as presumptively inadmissible until the proponent

has been able to show by independent evidence a conspiracy and the membership in it of the defendant and the declarant, which gives rise to the justifications for admissibility—agency and reliability.[37] Without the traditional requirement of independent evidence, admission of a co-conspirator's statements against a defendant broadens the scope of the co-conspirator's exception and poses serious Confrontation Clause problems.

The Advisory Committee's Note to Fed. R. Evid. 801 (d)(2)(E) establishes that the Committee believed it was not broadening the co-conspirator's exception or exemption. 56 F.R.D. at 299. The wording of Fed. R. Evid. 801 (d)(2)(E) is consistent with this belief. The rule provides that a statement that otherwise would be excluded as hearsay is admissible if it is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." The Advisory Committee apparently assumed that the trial judge would first determine that there was a conspiracy in which the declarant and the party were members and then proceed to find whether a statement was made during the course and in furtherance of the conspiracy.

The requirement that the determination of the conspiracy and its membership be made on independent evi-

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[37] In *Lee*, the Court rejected the argument that the statement should have been acceptable as a declaration against interest: "We reject respondent's categorization of the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." 106 S. Ct. at 2064 n.5. A statement by a co-conspirator is equally prejudicial and should be equally unacceptable without the independent evidence of conspiracy and membership that brings the statement within Fed. R. Evid. 801 (d)(2)(E).

dence, petitioner argues, is essential to avoiding Confrontation Clause problems.[38] In *United States* v. *Inadi*, ___ U.S. ___ 106 S.Ct. 1121 (1986), the dissenting opinion quoted with approval the following statement:

> "Conspirators' declarations are good to prove that some conspiracy exists but less trustworthy to show its aims and membership. The conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different members) and other aims than in fact it has. It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law."
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> 106 S.Ct. at 1131, (Marshall J., dissenting).[39]

Although the majority ultimately reached a different conclusion with respect to the necessity for an unavailability requirement, it reasoned in part that a requirement that the government show unavailability would be unduly burdensome on the judicial system. 106 S.Ct. at 1128. Without quarreling with the *Inadi* result, petitioner notes that the effect of *Inadi* is to remove an opportunity in many cases for a defendant to examine a co-conspirator whose statement is offered. This means

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[38] Petitioner's final argument, *infra*, suggests that, if the Court reads the Federal Rules of Evidence as incorporating the proof *aliunde* requirement as most circuits have already done, statements that are admissible under Fed. R. Evid. 801 (d)(2)(E) generally will not require an independent Confrontation Clause analysis. But, if the Court holds that a trial judge may rely on the challenged hearsay statements to support an admissibility ruling, petitioner would argue that in every case a second-level Confrontation Clause analysis would be necessary, since there would be no warrant for confidence in either the reliability or the agency aspect of the statements.

[39] Quoting from Levie, Hearsay and Conspiracy, 52 Mich. L. Rev. 1159, 1165-66 (1954).

that the foundation requirement for admissibility is as important, if not more so, today as when *Glasser, supra*, was decided. Unless the proponent of a co-conspirator's statement can satisfy the minimum standard and persuade a trial judge by independent evidence that a statement was made by one co-conspirator as part of a conspiracy involving the defendant, there is no adequate basis for admitting the statement on agency or reliability grounds. Admission would violate the Confrontation Clause even if it would satisfy Fed. R. Evid. 801 (d)(2)(E).[40]

The circuits that have utilized the standard advocated herein have not found problems with it. Indeed, the decisions in these circuits provide clear guidance to trial judges and to prosecutors as to what is expected of them. Moreover, the decisions impinge only slightly on the flexibility otherwise provided by Rule 104 (a), since hearsay other than the very co-conspirator statements to which objections are made may be considered as part of the independent evidence. Personal admissions by defendants, for example, commonly provide part of the foundation for admissibility of statements under Fed. R. Evid. 801 (d)(2)(E).[41] Moreover, acts and even statements that

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[40] Admission would violate the standard set forth by a plurality of the Court in *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion): "The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of the fact [has] a satisfactory basis for evaluating the truth of the prior statement.' *California* v. *Green*, 399 U.S., at 161." There would be no satisfactory basis for a jury's evaluating the relationship of the defendant, against whom a co-conspirator's statement was offered, to the co-conspirator-declarant or to the alleged conspiracy.

[41] *E.g.*, *United States* v. *Ziele*, 734 F.2d 1447 (11th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

are not offered for their truth may be admitted without raising either hearsay or confrontation problems.[42]

III. ASSUMING THAT THE TRIAL JUDGE FINDS BY A PREPONDERANCE OF THE INDEPENDENT EVIDENCE THAT A CONSPIRACY EXISTED THAT INCLUDED THE CO-CONSPIRATOR AND THE DEFENDANT, AND THE JUDGE ALSO FINDS THAT THE CO-CONSPIRATOR'S STATEMENT WAS MADE DURING AND IN FURTHERANCE OF CONSPIRACY, GENERALLY NO ADDITIONAL RELIABILITY DETERMINATION IS REQUIRED BY THE CONFRONTATION CLAUSE[43]

A. The Hearsay Rule And The Confrontation Clause Protect Similar Interests, But Are Not Identical In Their Scope

In *Dutton* v. *Evans*, 400 U.S. 74 (1970), a plurality of the Court wrote as follows: "It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now." *Id.* at 86 (footnotes omitted). Prior to *Dutton*, the Court had determined in *California* v. *Green*, 399 U.S. 149, 155-56 (1970), that the Confrontation Clause may be violated even where hearsay rules are not, and that evidence admitted in violation of long-established hearsay rules does not lead to a conclusion that there is an automatic confrontation violation.

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[42] *See Tennessee* v. *Street*, 471 U.S. 409 (1985).

[43] As noted earlier, the Advisory Committee concluded that a finding of reliability was not a prerequisite to admission of a co-conspirator's statement. Fed. R. Evid. 801 (d)(2)(E) makes no mention of reliability. Thus, petitioner assumes that if a reliability analysis were to be required, its source would be the Confrontation Clause.

Both the hearsay rule and the Confrontation Clause address similar concerns in a criminal case: to wit, "[an] underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence." *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980). The more effective the hearsay rule is in screening out the least acceptable forms of hearsay, the less pressure is placed on the Confrontation Clause to assure that defendants are receiving fair trials.

B. *Dutton* v. *Evans* Establishes That There May Be Confrontation Problems Even Though A Statement Qualifies For Admission As A Co-Conspirator's Statement

Eight Justices concluded in *Dutton* v. *Evans*, 400 U.S. 74 (1970), that the fact that a statement qualified for admission under a hearsay exception for co-conspirator's statements did not automatically mean that it met the requirements of the Confrontaton Clause. Although four Justices found that the statement did not violate the Clause and four dissenters argued that it did, only Justice Harlan accepted the argument that the Confrontation Clause did not impose limitations on the definitions of hearsay and the exceptions to the hearsay rule.[44] Since *Dutton*, the Court has reiterated that "[t]he historical evidence leaves little doubt . . . that the Clause was intended to exclude some hearsay." *Ohio* v. *Roberts*, 448 U.S. at 63.

The Court has also written, however, that "reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception," while "[i]n

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[44] Justice Harlan cast the fifth vote for affirming the conviction. 400 U.S. at 93-100 (Harlan J., concurring in the judgment).

other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* at 66. In *Inadi*, 106 S.Ct. at 1124 n.3, the Court left open the question whether a statement qualifying for admissibility under Fed. R. Evid. 801 (d)(2)(E) must satisfy an additional reliability standard derived from the Confrontation Clause.

Petitioner submits that, as long as this Court requires the trial judge to determine by a preponderance of the independent evidence that a conspiracy existed and that a declarant and a defendant were members, and the trial judge also finds by a preponderance of all the evidence that a statement was made during and in furtherance of conspiracy, no additional finding ought to be deemed necessary in the typical case to satisfy the Confrontation Clause. The evidence rule would be sufficient to protect a defendant from having statements used when they could not fairly be attributable to the defendant under an agency or a reliability analysis.

This argument is consistent with *Dutton*, *supra*. The problem in *Dutton* was that the Georgia rule was not the common law, traditional approach to co-conspirator statements, because Georgia had a unique approach to the termination of a conspiracy. That rule invited the introduction of statements made after the end of any true joint relationship among former conspirators. Thus, this Court accordingly tested the statement that was admitted in that case under a reliability analysis.

Were the Court to weaken the proof *aliunde* requirement in the instant case, *Dutton* would indicate that a defendant should be able to compel a trial judge to make a Confrontation Clause analysis notwithstanding the admissibility of evidence under Fed. R. Evid. 801

(d)(2)(E). But, as long as the preponderance of the evidence standard and the independent evidence requirement are retained, a Confrontation Clause analysis would be superfluous in the typical case. The advantages, then, of interpreting the evidence rule to track the approach of the majority of circuits include not only the clarity provided by the interpretation, but also the avoidance of Confrontation Clause arguments in every case in which a co-conspirator's statement is offered.

The only cases in which a trial judge should find it necessary to test a co-conspirator's statement that falls within Fed. R. Evid. 801 (d)(2)(E) under the Confrontation Clause are those in which a defendant specifically objects on Confrontation Clause grounds and articulates reasons why co-conspirator statements are not only crucial in the case, but also are unusually unreliable. In these atypical cases, the trial judge should be required to determine whether the statements should, in fairness, be used against a defendant who has no opportunity to cross-examine the declarant.

Dutton, *supra*—which involved a statement made by one alleged co-conspirator, Williams, that was used against another alleged co-conspirator, Evans, in a case in which a third alleged co-conspirator, Truett, testified against Evans—suggests what the atypical cases might look like:

> "First, the statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight. Second, Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by Truett's testimony and by Williams' prior conviction. It is inconceivable that cross-examination could have shown that Williams was not in a position

> to know whether or not Evans was involved in the murder. Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime. These circumstances go beyond a showing that Williams had no apparent reason to lie to Shaw. His statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant."

400 U.S. at 88-89 (plurality opinion).

If one alleged co-conspirator, who had reason to believe that he and others were under investigation, made statements suggesting that another person or several others were responsible for various things, such statements, assuming they still might be in furtherance of conspiracy, might be suspect. They would be even more suspect if the co-conspirator who made the statements could not have had personal knowledge about events or the events were remote so that memory might well be unreliable. The burden of alleging specific defects and of demonstrating their significance would have to be borne by a defendant before the trial judge would need to make a Confrontation Clause decision.

In holding open the possibility that in unusual cases the Confrontation Clause might exclude statements that qualified for admission under Fed. R. Evid. 801 (d)(2)(E), petitioner suggests that the Court use the same type of approach, albeit in reverse, that it used in *Lee* v. *Illinois*, *supra*. Addressing the situation of one defendant's confession implicating another defendant, the Court

described its decision in *Bruton* v. *United States*, 391 U.S. 123 (1968), as resting on the fact that a confession that incriminates an accomplice is so "inevitably suspect" and "devastating" that the ordinarily sound assumption that a jury will be able to follow faithfully its instructions could not be applied. 106 S.Ct. at 2063. But the Court recognized that the presumption could be rebutted and that a "showing of particularized guarantees of trustworthiness" would satisfy confrontation concerns, citing *Ohio* v. *Roberts*. *Id.* at 2063-64.[45]

The presumption under Fed. R. Evid. 801 (d)(2)(E), if the appropriate standard for preliminary fact finding is adopted, should be that when the rule is satisfied the Confrontation Clause is satisfied also.[46] Only in cases in

[45] Petitioner submits that nothing in *Colorado* v. *Connelly*, ____ U.S. ____, 107 S.Ct. 515 (1986), suggests a different result. This Court rejected the argument by the respondent in *Connelly* that, before a confession is admitted against a defendant, a "free will" determination should be required in addition to a determination that the government did not coerce a statement from a suspect. The opinion for the Court clearly indicates that the only argument made by respondent rested upon the Fifth Amendment privilege against self-incrimination and the coerced confession doctrine. *Connelly* involved the question of the fairness of using an individual's own statements against him. In the instant case, the issue is whether a third party's statement may be used against a defendant, and that issue involves the Confrontation Clause of the Sixth Amendment.

[46] The federal circuits have been divided over the relationship of the Confrontation Clause to Fed. R. Evid. 801 (d)(2)(E). Some appear to hold that statements that satisfy the rule never need be examined for reliability. *See, e.g., United States* v. *Chindawongse*, 771 F.2d 840 (4th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct 859 (1986); *United States* v. *Chiavolo*, 744 F.2d 1271 (7th Cir. 1984). That is the approach taken by the court of appeals in the instant case. 781 F.2d at 543. Other courts have held that satisfaction of the evidence rule does not necessarily indicate satisfaction of the constitutional standard. *See, e.g., United States* v. *Pagan*, 721 F.2d 24 (2d Cir. 1983); *United*

which the defendant is able to demonstrate particularized dangers of unreliability with respect to critical prosecution evidence will the Confrontation Clause have independent force.[47]

States v. *DeLuna*, 763 F.2d 897 (8th Cir.), *cert. denied sub nom. Thomas* v. *United States*, ____ U.S. ____, 106 S.Ct. 382 (1985); *United States* v. *Lopez*, 803 F.2d 969 (9th Cir. 1986). Some courts have noted that confrontation attacks have been consistently rejected but have not conclusively ruled that an attack will never succeed. *See, e.g., United States* v. *Dunn*, 758 F.2d 30 (1st Cir. 1985). In some cases, courts have rejected specific confrontation arguments without clearly indicating whether in other settings the arguments might prevail. *See, e.g., United States* v. *Alfonso*, 738 F.2d 369 (10th Cir. 1984); *United States* v. *Georgia Waste Systems, Inc.*, 731 F.2d 1580 (11th Cir. 1984). Generally, the federal appellate courts have not examined the relationship of the standard used for preliminary fact finding and the Confrontation Clause standard. Petitioner submits that the preponderance standard, properly focusing on independent evidence of conspiracy and membership, plus findings with respect to the timing and the relationship of statements to a conspiracy, would satisfy confrontation concerns in the vast majority of cases. Petitioner notes that the jurisdiction that has been most burdened with Confrontation Clause claims is the Ninth Circuit, which has not adopted the preponderance standard. *See, e.g., United States* v. *Lopez, supra; United States* v. *Mouzin*, 785 F.2d 682 (9th Cir.), *cert. denied sub nom. Charvigal* v. *United States*, ____ U.S. ____, 107 S.Ct. 574 (1986); *United States* v. *Jennell*, 749 F.2d 1302 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 114 (1985); *United States* v. *O'Connor*, 737 F.2d 814 (9th Cir. 1984), *cert. denied*, 469 U.S. 1218 (1985); *United States* v. *Ordonez*, 737 F.2d 793 (9th Cir. 1984).

[47] If petitioner's argument prevails, there will be no need to reach a Confrontation Clause argument in this case. *See* note *48 infra*. If, however, the Court holds that conspirator statements may be admitted upon something less than proof by a preponderance of the independent evidence of conspiracy and membership, petitioner would rely upon the Confrontation Clause as well as upon the evidence rule. In the instant case, no person other than Lonardo made statements suggesting that there was a conspiracy. Lonardo had his own reasons

CONCLUSION

The district court and the court of appeals relied heavily on the contents of taped conversations to conclude that the government had shown sufficient evidence of conspiracy to admit the conversations against petitioner.[48] Petitioner asks the Court to hold that the lower courts used an

for indicating to Greathouse that he had buyers. Yet, petitioner could not examine Lonardo. Nothing in Lonardo's statements suggests reliability.

[48] Under the standard of proof for preliminary fact finding that petitioner urges, there was plainly insufficient evidence to support the trial judge's ruling. The trial judge made no findings of fact, but simply accepted the government's argument that Fed. R. Evid. 801 (d)(2)(E) had been satisfied. It is virtually impossible to believe that the trial judge could have admitted the taped statements for the truth of the matters asserted therein without relying on the contents of the statements as the principal, if not the exclusive, basis for finding that the evidence rule was satisfied. The government offered no evidence tending to prove that petitioner knew Lonardo prior to the date of petitioner's arrest, that petitioner had any knowledge of Lonardo's relationship to any other prospective purchasers of cocaine, or that petitioner and Lonardo had done anything more than agree that on a single occasion one would receive cocaine from the other. On these facts, if this Court accepts the standard of proof that petitioner proposes, it would be justified in holding that there was insufficient independent evidence of conspiracy to warrant admission of the taped conversations and to spare both sides and the court of appeals the burden of revisiting the issue.

incorrect approach to Fed. R. Evid. 801 (d)(2)(E) and either to hold that the taped statements were improperly admitted or to vacate the judgment and remand the case for further proceedings consistent with a correct approach.

Respectfully Submitted

JAMES R. WILLIS
(Counsel of Record)
Suite 610, Bond Court Building
1300 East Ninth Street
Cleveland, OH 44114
(216) 523-1100

JAMES M. SHELLOW
Shellow, Shellow & Glynn, S.C.
222 East Mason Street
Milwaukee, WI 53202
(414) 271-8535

STEPHEN ALLAN SALTZBURG
Professor of Law
University of Virginia
School of Law
Charlottesville, VA 22901
(804) 924-3520
Counsel for Petitioner

No. 85-6725

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM JOHN BOURJAILY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

In order to admit a co-conspirator declaration against a defendant under Fed. R. Evid. 801(d)(2)(E), the court must find (1) that a conspiracy existed, (2) that the declarant and the defendant were members of the conspiracy, and (3) that the declaration was made in the course of and in furtherance of the conspiracy. This case presents the following questions:

1. Whether, in determining if the conspiracy existed and if the defendant and the declarant were members of the conspiracy, the court may consider the declaration itself or must base its determination solely on independent evidence;

2. What quantum of proof is necessary to support the findings the court must make under Rule 801(d)(2)(E); and

3. Whether the Confrontation Clause of the Sixth Amendment requires a court, before admitting a co-conspirator declaration, to make a separate determination that the declaration is reliable.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 781 F.2d 539.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1986. On March 10, 1986, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to April 15, 1986. The petition was filed on April 15, 1986, and was granted on October 14, 1986. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

Rule 104 of the Federal Rules of Evidence provides, in pertinent part, as follows:

> (a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).

> In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Rule 801 of the Federal Rules of Evidence provides, in pertinent part, as follows:

> (d) *Statements which are not hearsay*. A statement is not hearsay if—
>
> * * * * *
>
> (2) * * * The statement is offered against a party and is * * * (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 15 years' imprisonment and to a three-year special parole term on the substantive count. The court of appeals affirmed (Pet. App. A1-A7).

1. The evidence at trial showed that during the second week of May 1984, FBI informant Clarence Greathouse made arrangements to transfer one kilogram of cocaine to petitioner's co-defendant, Angelo Lonardo.[1] According to their agreement, Lonardo was to select people to distribute the cocaine. On May 12, 1984, Greathouse met with Lonardo to discuss the cocaine sale. In the ensuing conversation, which Greathouse tape-recorded on a body recorder, Lonardo said that he had talked to "the people" and that they were "interested." Greathouse asked whether Lonardo's "people" would be willing to pay for the cocaine "up front" or whether they preferred "to wait till it's here."

[1] Lonardo was convicted together with petitioner, but he did not appeal from his conviction.

Lonardo replied that they would handle the transaction as they had in the past. He stated that his contacts did not know that Greathouse was his supplier, and he added that he wanted to keep it that way. Greathouse demanded one half of the purchase price before delivery, and he requested that each of Lonardo's buyers purchase at least one-fourth of a kilogram. Lonardo agreed and said that he would let Greathouse know where the cocaine sale would take place. Pet. App. A3; J.A. 13, 88-89, 99-101; Tr. 10-19, 21, 24-26, 33; GX 1C.

On May 17, Greathouse told Lonardo that "nothing [had] matured" yet, but that he "planned * * * a flight" three days from then, and that "everything is set on that end" (J.A. 117; GX 3B). Greathouse said that he needed some money to take with him and that "everything else will be fronted to me" (J.A. 118; GX 3B). Lonardo responded that he would "work on it" and "see what [he could] do" (*ibid.*). On May 19, Lonardo called Greathouse on his paging beeper; when Greathouse returned the call, Lonardo advised Greathouse that he had some money for him, and he told Greathouse to come pick it up. Shortly after the call, Greathouse met Lonardo at a Cleveland restaurant, and Lonardo gave him $1,000. Pet. App. A3; J.A. 121-122; Tr. 39, 43-46, 49-54; GX 5B.

Greathouse and Lonardo had several more conversations about the cocaine transaction during the following week. On May 24, Greathouse met with Lonardo and told him that the cocaine had arrived. Lonardo said that he would recontact the prospective buyers, but he explained that he had told his confederates that the deal was off because of a misunderstanding about the purchase price. Pet. App. A3; J.A. 133-135; Tr. 68-84; GXs 7B, 9B, 10B, 11B.

In a tape-recorded telephone conversation on May 25, Lonardo told Greathouse that he had a "gentleman friend" with him who "had some questions" to ask Greathouse

about "the trees"—a code word referring to the cocaine. Lonardo indicated that he wanted Greathouse to call back immediately. J.A. 137; Tr. 83-86, 87; GX 12B. The second call was not recorded, but an FBI agent who was with Greathouse at the time listened to both sides of the conversation. In the course of that call, Greathouse spoke directly with Lonardo's "gentleman friend." J.A. 23-25, 37-38; Tr. 103-105, 753-755. The two discussed the quality of the cocaine and how the payment for the cocaine would be made. Lonardo's "friend" told Greathouse that he would pay $15,000 "up front" and the balance of the $31,000 purchase price after the cocaine was tested. J.A. 24; Tr. 104.

After speaking with Lonardo's "friend," Greathouse once again spoke with Lonardo to arrange for the delivery of the cocaine. J.A. 25-26, 138-140; Tr. 110-111; GX 13B. Lonardo told Greathouse to bring the cocaine to the Hilton Hotel on Rockside Road in Cleveland and to park his car behind the hotel. Lonardo said he would be waiting in the lobby, and that Greenhouse was to bring him the keys to the car. Lonardo said that his "friend" would be "out in his car" and that after receiving Greathouse's keys Lonardo would "just go over and you know." Pet. App. A3; J.A. 30, 139-140; GX 13B.

Thereafter, FBI agents placed four quarter-kilogram bags of cocaine in Greathouse's car and had him drive to the Hilton Hotel. At the time that had been arranged for the transaction, petitioner was seen sitting in a car in the hotel parking lot. He was facing away from the hotel and was parked in an area apart from the other parked cars. Petitioner was subsequently observed driving around the parking lot, examining the parked cars. Pet. App. A3-A4.

When Greathouse arrived, he entered the Hilton and gave Lonardo the keys to his car. Lonardo walked to Greathouse's car, circled it, and then walked to petitioner's car, where he spoke with petitioner. Lonardo then walked back to Greathouse's car and removed the cocaine. As

Lonardo approached Greathouse's car, petitioner turned his car around and drove it to a point within two or three parking spaces of Greathouse's car. Lonardo took the cocaine from Greathouse's car, carried it to petitioner's car, and handed it to petitioner. At that point, the agents arrested petitioner and Lonardo and recovered the cocaine from petitioner's car. Inside a leather bag that was secreted under the passenger seat of petitioner's car, the agents found $19,000 in cash, together with a receipt bearing petitioner's name. The agents found an additional $2,000 in $100 bills in the glove compartment, along with petitioner's driver's license. On petitioner's person, the agents found a paging beeper. Pet. App. A4; J.A. 27-30, 41-46, 53, 56-62; Tr. 113-121, 767-779, 807, 877-893.

At the conclusion of the government's case in chief, the district court addressed the question of the admissibility of Lonardo's out-of-court statements against petitioner. J.A. 66-75; Tr. 973-989. The court found that the government had established by a preponderance of the evidence that a conspiracy existed, that Lonardo and petitioner were members of the conspiracy, and that Lonardo's out-of-court statements had been made in the course of and in furtherance of the conspiracy. J.A. 75; Tr. 989.

2. The court of appeals affirmed (Pet. App. A1-A7). It held, first, that the statements Lonardo made to Greathouse had been properly admitted against petitioner as co-conspirator declarations under Fed. R. Evid. 801(d)(2)(E) (Pet. App. A4). The court upheld the district court's findings that the government had satisifed the requirements of Rule 801(d)(2)(E) by showing, by a preponderance of the evidence, that a conspiracy existed, that Lonardo and petitioner were members of it, and that Lonardo's statements were made during the course of and in furtherance of the conspiracy. As evidence that Lonardo and petitioner were co-conspirators, the court of

appeals relied both on Lonardo's statements to Greathouse and on petitioner's actions in the hotel parking lot on the evening that he received the cocaine (Pet. App. A4-A5). Finally, the court held (*id.* at A5-A6) that because Lonardo's statements satisfied the requirements of Rule 801(d)(2)(E)—which the court of appeals determined to be a " 'firmly rooted hearsay exception' " (Pet. App. A5, quoting *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980))—the admission of those statements against petitioner did not violate petitioner's rights under the Confrontation Clause.

SUMMARY OF ARGUMENT

I. It is well settled that before admitting a co-conspirator declaration against a defendant under Rule 801(d)(2)(E), the trial court must first find that a conspiracy existed and that the declarant and the defendant were members of the conspiracy. The first issue presented in this case is whether the trial court must make that decision based solely on evidence independent of the statement itself. In *Glasser* v. *United States*, 315 U.S. 60 (1942), this Court held that co-conspirator statements are admissible against a defendant "only if there is proof *aliunde* that he is connected with the conspiracy. Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." 315 U.S. at 74-75 (citations omitted).

The rule against "bootstrapping" originated in an evidentiary system that assigned to juries—and not courts—the task of deciding the admissibility of co-conspirator declarations. Under Rule 104(a) of the Federal Rules of Evidence, however, the admissibility decision is now clearly committed to the court. Accordingly, there is no continuing need for a prophylactic rule of the sort that barred jurors from considering the co-conspirator statement itself while they were deciding its admissibility. Indeed, Rule 104(a) specifically authorizes the trial judge, in making decisions on the admission of evidence, to consider all relevant, non-privileged evidence bearing on the factual and legal questions that the court must address. To be sure, statements made by a co-conspirator regarding the existence and composition of a conspiracy may, in particular cases, be less probative than other evidence bearing on those issues. But that is a matter that a district court can properly assess in weighing all the relevant evidence. It is not a reason to skew the fact-finding process by disabling the court from giving any consideration to the co-conspirator declaration, no matter how compelling it may be as evidence of the existence and composition of a conspiracy in a particular case.

Even if the Court concludes that the "bootstrapping" rule should be preserved, the Court should make clear that the rule does not prohibit the district court from considering the co-conspirator declarations at all, but only from considering the hearsay portions of those declarations. That is, if a particular co-conspirator declaration is not an assertion offered to prove the truth of the matter asserted, or if the declaration is admissible under some other exemption from or exception to the rule against hearsay, the district court should be free to consider the declaration in determining whether the remaining, hearsay portions of the declaration should be admitted. In this case, for example, most of Lonardo's declarations are either not assertions at all, or are statements of his intentions with regard to future acts, which would be admissible under the "state of mind" exception to the hearsay rule, Fed. R. Evid. 803(3). Even if this Court decides to preserve the "bootstrapping" rule, the district court could properly consider those portions of Lonardo's declarations in determining whether Lonardo and petitioner were co-conspirators. And taking those portions of Lonardo's declarations into account, there can be no doubt that the district court's ruling on that issue was correct.

II. The second issue presented in this case concerns the standard of proof that a district court should apply in ruling on the admissibility of co-conspirator statements. We agree with petitioner that "preponderance of the evidence" is the proper standard. This Court has repeatedly applied the preponderance standard in deciding questions of admissibility in analogous contexts, and the rationale for using the preponderance standard in those cases applies equally here.

III. The third question presented in this case is whether the Confrontation Clause requires a trial court to conduct a separate inquiry into the reliability of a co-conspirator declaration, even after the declaration has been found admissible under Fed. R. Evid. 801(d)(2)(E). We believe that no such inquiry is required. The co-conspirator declaration rule, embodied in Rule 801(d)(2)(E), is a "firmly rooted" exception to the rule against hearsay; under this Court's decisions, statements embraced by that exception are therefore sufficiently reliable to satisfy Confrontation Clause concerns. The prerequisites to admissibility contained in Rule 801(d)(2)(E) already ensure that statements admitted under the rule will be sufficiently reliable to justify their submission to the jury. A separate reliability inquiry would prove burdensome on trial and appellate courts without significantly promoting the purposes served by the Confrontation Clause.

ARGUMENT

I. A TRIAL COURT IS NOT CONFINED TO THE "INDEPENDENT EVIDENCE" IN DECIDING WHETHER A CO-CONSPIRATOR DECLARATION IS ADMISSIBLE.

In *Glasser* v. *United States*, 315 U.S. 60 (1942), this Court stated that co-conspirator statements are admissible against a defendant "only if there is proof *aliunde* that [the defendant] is connected with the conspiracy. Otherwise, hearsay would lift itself by its own bootstraps to the level

of competent evidence." 315 U.S. at 74-75.[2] Relying on *Glasser*, a majority of the courts of appeals have held that in deciding whether a declarant and defendants are co-conspirators—the inquiry required by Fed. R. Evid. 801(d)(2)(E)—a trial court may consider only the evidence independent of the co-conspirator statement itself.[3]

The first question presented in this case is whether the "bootstrapping rule" has any continuing vitality in light of Rule 104(a) of the Federal Rules of Evidence. Rule 104(a) provides that courts, not juries, are to make determinations of admissibility, and that in making those determinations, courts are not bound by the rules of evidence, except for those relating to privilege. We submit that the bootstrapping rule was the product of a system in which the task of determining the admissibility of co-conspirator declarations was given to juries, and that the rule cannot be justified in a system in which that task is given to the court.

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[2] The Court also alluded to the rule against "bootstrapping" in *United States* v. *Nixon*, 418 U.S. 683 (1974), where the Court stated, in passing, that before the declarations of one conspirator may be admitted against another there must be "a sufficient showing, by independent evidence," of a conspiracy involving both the declarant and the defendant against whom the declaration is offered. 418 U.S. at 701 & n.14.

[3] See, *e.g.*, *United States* v. *DeJesus*, 806 F.2d 31, 34 (2d Cir. 1986); *In re Japanese Electronic Products Antitrust Litig.*, 723 F.2d 238, 261 (3d Cir. 1983), rev'd on other grounds *sub nom*, *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, No. 83-2004 (Mar. 26, 1986); *United States* v. *Monaco*, 702 F.2d 860, 876 (11th Cir. 1983); *United States* v. *Miranda-Uriarte*, 649 F.2d 1345, 1349, (9th Cir. 1981); *United States* v. *Gresko*, 632 F.2d 1128, 1131 (4th Cir. 1980); *United States* v. *Jackson*, 627 F.2d 1198, 1215-1216 n.34 (D.C. Cir. 1980); *United States* v. *James*, 590 F.2d 575, 581 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Andrews*, 585 F.2d 961, 966 (10th Cir. 1978); *United States* v. *Santiago*, 582 F.2d 1128, 1133 n.11 (7th Cir. 1978); *United States* v. *Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978).

1. The reason for the bootstrapping rule is not easy to discern. The *Glasser* opinion merely recited the rule, without suggesting any justification for it. From the early authorities that have been cited in support of the rule, however, it appears to have been based, at least in part, on the allocation to juries of the responsibility for deciding whether to admit co-conspirator declarations.

At the time the bootstrapping rule developed, the task of determining the admissibility of co-conspirator declarations was routinely assigned to juries, not to judges. Thus, juries were typically instructed that in order to consider co-conspirator declarations against a defendant, the jury—not the trial court—would first have to decide whether the declarant was part of the conspiracy with the defendant. Because juries were not permitted to consider incompetent evidence, the courts instructed the jurors that they had to make the finding of conspiracy before they could consider the co-conspirator declarations. Only after the jury found, from competent non-hearsay evidence, that the defendant and the declarant were members of the conspiracy would the co-conspirator declarations in turn become competent evidence that could be considered against the defendant for other purposes. The courts summarized this point by instructing juries that they had to make the finding of conspiracy based on evidence independent of the co-conspirator declarations. See *Hauger* v. *United States,* 173 F. 54, 57 (4th Cir. 1909); *United States* v. *Richards,* 149 F. 443, 452-453 (D. Neb. 1906); *United States* v. *Goldberg*, 25 F.Cas. 1342, 1347 (E.D. Wis. 1876) (No. 15,223); *United States* v. *McKee*, 26 F.Cas. 1107, 1110 (E.D. Mo. 1876) (No. 15,686).[4]

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[4] Pattern jury instructions throughout much of this century ordinarily included a charge that told the jury that it could consider co-conspirator statements only after it had determined that the charge of conspiracy had been proved. See, *e.g.*, 5 A. Reid, *The Law of Instructions to Juries* § 3336, at 88-90 (3d ed. 1962); 2 H. Randall, *A Treatise on the Law of Instructions to Juries* § 1812(3), at 2079 (1922). The *Glasser* case itself was submitted to this Court on the theory that the jury had the final word on the admissibility of co-conspirator statements. See Brief for the United States, at 61 n.6, *Glasser* v. *United States*, 315 U.S. 60 (1942).

The practice of leaving to the jury the final decision whether to admit a co-conspirator statement into evidence persisted until the enactment in 1975 of the Federal Rules of Evidence. Indeed, as late as its 1977 edition, the leading treatise on federal jury instructions continued to recommend a charge instructing the jury that it could consider co-conspirator statements against someone other than the declarant only if it first found beyond a reasonable doubt that a conspiracy had been proved. See 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 27.06, at 13 (3d ed. 1977). This Court's 1974 decision in *Anderson* v. *United States*, 417 U.S. 211, involved just such a jury instruction (417 U.S. at 221), and the circuit courts routinely endorsed that instruction as well. See, *e.g.*, *United States* v. *Honneus*, 508 F.2d 566 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975); *United States* v. *Apollo*, 476 F.2d 156 (5th Cir. 1973); see also 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 104[05], at 104-40 & n.9 (1986).

In this historical context, the bootstrapping rule is easily understood as an exclusionary device intended to ensure that juries would not rely on incompetent evidence in making the admissibility decision. See *United States* v. *Martorano*, 561 F.2d 406, 408 (1st Cir. 1977), cert. denied, 435 U.S. 922 (1978); *United States* v. *Petrozziello*, 548 F.2d 20, 22-23 & n.2 (1st Cir. 1977); *United States* v. *James*, 590 F.2d 575, 587 (5th Cir.) (en banc), (Tjoflat, J., concurring specially) cert. denied, 442 U.S. 917 (1979). As long as juries decided the admissibility of co-conspirator statements, there was a logical basis to apply a rule that confined the scope of their decisionmaking authority.

2. Rule 104(a) of the Federal Rules of Evidence has now abolished the evidentiary system in which the bootstrapping rule arose. Under Rule 104(a), the decision whether to admit evidence is vested exclusively in the trial court. In making that decision, moreover, the rule explicitly authorizes the court to consider all relevant, non-privileged evidence.[5]

By enacting Rule 104(a), Congress swept aside the technical exclusionary rules of evidence, which were unsuited to the judicial function. The language Congress chose to express its intention was broad and unambiguous. The plain terms of Rule 104(a) state that in making admissibility decisions the trial judge "is not bound by the rules of evidence" except for those relating to privilege.[6] Privileged material is the *only* evidence that is off-limits. No other exceptions—such as the rule forbidding the consideration of "bootstrapped" evidence—are listed. Under Rule 104(a) there is thus no reason for a trial judge to refrain from considering a co-conspirator statement in deciding the preliminary question of admissibility under

[5] Petitioner (Pet. 10-11) and most courts and commentators agree that the adoption of Rule 104(a) had the effect of discarding the system under which the jury was given the last word on the admissibility of co-conspirator statements. See *United States* v. *James*, 590 F.2d 575, 579-580 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Petrozziello*, 548 F.2d 20, 22-23 (1st Cir. 1977); accord 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 104[05], at 104-39 to 104-40 (1986); 4 D. Louisell & C. Mueller, *Federal Evidence* § 427, at 331-332 (1980); S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 735 (4th ed. 1986); *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 261 (3d Cir. 1983), rev'd on other grounds, No. 83-2004 (Mar. 26, 1986).

[6] Fed. R. Evid. 1101(d)(1) restates the point, providing that the rules (other than those with respect to privileges) do not apply to "[t]he determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104."

Rule 801(d)(2)(E). Accord Bergman, *The Coconspirators' Exception: Defining The Standard of the Independent Evidence Test Under the New Federal Rules of Evidence*, 5 Hofstra L. Rev. 99, 105-106 (1976).

This reading of the plain terms of Rule 104(a) is confirmed by the accompanying notes of the Advisory Committee.[7] The Advisory Committee made clear that under Rule 104(a) the trial judge is free to rely on any relevant, non-privileged material in making admissibility decisions. The exclusionary rules of evidence, the Advisory Committee stated, do not limit the judge in determining whether evidence should be admitted (Fed. R. Evid. 104(a) advisory committee note, 28 U.S.C. App. at 681):

> If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. McCormick § 53, p. 123, n.8, points out that the authorities are "scattered and inconclusive," and observes:
>
> "Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the

[7] This Court has frequently relied on Advisory Committee Notes in deciding the appropriate construction of rules of evidence or procedure. See, *e.g.*, *United States* v. *Young*, 470 U.S. 1, 15 n.12. (1985); *United States* v. *Abel*, 469 U.S. 45, 51 (1984); *Barefoot* v. *Estelle*, 463 U.S. 880, 905 n.9 (1983); *United States* v. *Frady*, 456 U.S. 152, 163 n.13 (1982); *Delta Air Lines* v. *August*, 450 U.S. 346, 352 n.8, 356-360 (1981). Deference to the Advisory Committee on the Rules of Evidence is particularly appropriate because, as the Reporter for the Advisory Committee has noted, the Notes "were carefully scrutinized by the involved congressional committees and subcommittees, and, except in those instances where superseding changes were made in the Rules by the Congress, must be taken to represent the thinking of that body as the equivalent of a committee report effectively serving as the basis of legislation." Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 Neb. L. Rev. 908, 913 (1978).

view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay."

The Advisory Committee specifically noted that the trial judge would often need to consider otherwise hearsay portions of a statement in determining the statement's admissibility (*ibid.*):

> An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted declaration against interest must be considered in ruling whether it is against interest.[8]

This court considered the implications of Rule 104(a) in *United States* v. *Matlock*, 415 U.S. 164 (1974), and concluded that trial judges are not bound by the rules of evidence in deciding whether to admit evidence. The issue in *Matlock* was whether the police had obtained lawful consent to search the defendant's premises from Mrs. Graff, the woman with whom defendant lived. At a hearing, the government offered evidence, chiefly the hearsay declarations of Mrs. Graff, that Mrs. Graff and the defendant jointly occupied the premises. The district court held that those hearsay statements were not admissible to prove that Mrs. Graff had the authority to consent to the search. 415 U.S. at 167-169.

This Court reversed. The Court noted, first, that the rules of evidence normally applicable in criminal trials "do not operate with full force at hearings before the judge to determine the admissibility of evidence." 415 U.S. at 172-173 (footnote omitted). That principle, the Court observed, was confirmed by Rule 104(a) of the Federal Rules of Evidence, which at that time had been transmitted to Congress but had not been enacted.[9] The Court cited with approval the view that when the judge is considering the admissibility of evidence, the exclusionary rules—other than the rules of privilege—should not be applicable. In that setting, "the judge should receive the evidence and give it such weight as his judgment and experience counsel." 415 U.S. at 175.[10]

Applying those principles, the Court determined that Mrs. Graff's statements were sufficiently reliable to be considered as evidence of her authority to consent to the search. The Court observed that there was no question that the statements had been made and nothing in the record to suggest that the statements were untrue. 415 U.S. at 175. The statements "were consistent with one another" and were "corroborated by other evidence received at the suppression hearings." *Id.* at 176. Moreover,

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[8] Chief Judge Weinstein, a member of the Advisory Committee, has written that under Rule 104(a) courts can "consider hearsay, including the very statement in question, in determining whether the * * * criteria for admissibility have been met," but he notes that "the courts have been reluctant to acknowledge this power." 1 J. Weinstein & M. Berger, *supra*, ¶ 104[05], at 104-44. Professor Cleary has taken a contrary view, but on the ground that Rule 104(b), and not 104(a), governs the admissibility of co-conspirator statements. See Cleary, *supra*, 57 Neb. L. Rev. at 918. That position has been uniformly rejected by the commentators, see, *e.g.*, 1 D. Louisell & C. Mueller, *supra*, § 29, at 208 & n.92; S. Saltzburg & K. Redden, *supra*, at 735, as well as by the courts—including those courts that maintain the rule against bootstrapping. See, *e.g.*, *United States* v. *James*, 590 F.2d at 579-580; *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d at 261. In any event, Professor Cleary apparently also believes that "virtually all declarations by co-conspirators will be found to qualify as 'verbal acts,' and hence not hearsay in the first place, by analysis or rules definition." E. Cleary, *McCormick on Evidence* § 53, at 139 (3d ed. 1984).

[9] The current Rule 104(a) is identical in all material respects to the version of the rule that the Court submitted to Congress.

[10] In support of that view, the Court cited the remarks of Thayer, referring to the exclusionary rules of evidence as "the child of the jury system," inappropriate when the judge is deciding questions of admissibility. 415 U.S. at 175 n.12 (citation omitted).

the Court noted, "cohabitation out of wedlock would not seem to be a relationship that one would falsely confess." The Court pointed out that cohabitation out of wedlock was a crime in Wisconsin and that Mrs. Graff's statements were thus "against her penal interest" and "carried their own indicia of reliability." *Ibid.*

The *Matlock* case affirms the basic principle that the trial judge should be able to consider all relevant, non-privileged evidence in deciding admissibility questions. Moreover, the Court in *Matlock* identified the factors a trial judge should consider in deciding whether to rely on a particular statement, or other piece of evidence, in making an admissibility decision. Those factors include: (1) whether the trial judge is satisfied that the statement was made (415 U.S. at 175); (2) whether the statement is internally consistent (*id.* at 176); (3) whether the statement is corroborated by other evidence in the case (*ibid*); and (4) whether, in light of the declarant's penal interest (or like factor), the statement bears "indicia of reliability" (*ibid.*).

The same kind of analysis should govern a trial court's decision whether to rely on the truth of a purported co-conspirator statement in determining the admissibility of the statement. Hearsay statements of all kinds must, of course, be scrutinized with care to determine whether they are sufficiently probative for a court to accord them any weight in making the findings required by Rule 801(d)(2)(E). As the Court observed in *Matlock*, however, some hearsay is more probative than other, and a district court can be trusted to discount particular items of hearsay as the circumstances dictate.

Petitioner does not suggest that the bootstrapping rule precludes the trial court from considering *all* hearsay statements. Nor could he, since the bootstrapping rule, by its terms, forbids a court only from relying on the particular hearsay statement that the government is seeking to have admitted. Thus, petitioner concedes (Br. 32) that a

court could consider other hearsay, such as the statement of a third party, in determining whether the defendant and the declarant were members of the conspiracy. Presumably, the bootstrapping rule would not even foreclose the court from considering other hearsay statements of the same declarant, separate from the ones that the government is seeking to have admitted. Yet if that is so, it is difficult to discern any continuing purpose for the bootstrapping rule, since there is no reason to believe that other hearsay statements are inherently more reliable than the hearsay statement under consideration for admission.

Rather than adhering to the bootstrapping rule, which is supported more by metaphor than by logic, the Court should apply Rule 104(a) according to its plain language and treat the admission of co-conspirator declarations the same as the admission of any other kind of evidence. If, after assessing the co-conspirator statement, the trial court finds that the statement is reliable, the court should be permitted to rely on the statement, along with any other pertinent evidence, in deciding whether the requirements of Rule 801(d)(2)(E) have been met.

3. Petitioner acknowledges (Br. 26-27) that the plain terms of Rule 104(a) would appear to abolish the bootstrapping rule, and he concedes (Br. 25-26) that the court can consider the co-conspirator statement itself in determining whether the statement was made during and in furtherance of the conspiracy. He contends, however, that Rule 104(a) should not apply to the question of the existence of the conspiracy. This is so, he suggests (Br. 29-30), because the Rules of Evidence were intended to preserve the co-conspirator exception in its pre-rules form, including the traditional requirement that the finding that the defendant and the declarant were members of the same conspiracy had to be based on independent, non-hearsay evidence.

The answer to this contention is that the Rules of Evidence preserved the substance of the co-conspirator exception but changed the manner in which the rule is to be administered. Rule 801(d)(2)(E) still requires proof that the defendant and the declarant were members of the same conspiracy, and that the declaration was made during and in furtherance of the conspiracy. What was changed in the new rules was that it is now the court, not the jury, that makes these findings. And with that change, it follows that, as in the case of other evidentiary matters, the court is permitted to consider all relevant, nonpriviledged evidence bearing on the issue of admissibility.

Petitioner suggests (Br. 29) that to permit courts to consider the statements themselves in determining their admissibility will lead to the admission of more unreliable evidence. That is true in only one sense: any rule that restricts the kind of evidence that a court can consider in determining whether the proponent of evidence has met his burden will result in the admission of less evidence; a reduction in the amount of evidence that is admitted will, of course, mean a reduction in the amount of unreliable evidence that is admitted. But it is by no means clear that co-conspirator declarations are more unreliable as a class than other evidence that courts typically look to in determining the admissibility of such statements. Thus, a particular statement by an alleged co-conspirator may have the inescapable ring of truth and be overwhelmingly corroborated. Yet, as petitioner would have it, a court may not consider that statement in determining whether the declarant and the defendant were members of a conspiracy. On the other hand, according to petitioner, a court may consider, without restriction, much more equivocal physical evidence in determining the existence and nature of the conspiracy. It is hard to find a justification for a rule that can have the effect of distorting the

fact-finding process by excluding some of the most probative evidence and forcing the courts to look to evidence that may be less reliable.

The irrationality of the scheme proposed by petitioner is underscored by the facts of this case. Lonardo's statements that his "gentleman friend" was with him at the telephone and would be paying $15,000 for the cocaine were immediately corroborated by the words of the "gentleman friend" on the telephone, by Lonardo's actions at the time of the transaction, and by petitioner's conduct in the hotel parking lot, where he accepted the cocaine and was arrested in possession of just over $15,000 in cash. Moreover, Lonardo's statements, which were made in the course of arranging an imminent drug transaction, were highly likely to be accurate, since Lonardo had every incentive to ensure that the transaction went smoothly. Thus, Lonardo's statements during his conversations with Greathouse constituted compelling, well corroborated, and reliable evidence of the existence of a conspiracy between himself and petitioner. On the other hand, the "independent" evidence—obtained through surveillance and seized from petitioner following his arrest—while still strong evidence of the conspiracy, was not nearly as compelling as Lonardo's statements themselves. There is no reason that a court should be forced to ignore the powerful evidence provided by the statements themselves in favor of exclusive reliance on the less compelling "independent" evidence in making the findings on which the admission of the evidence depends.

Finally, petitioner argues (Br. 21-23) that the Court should retain the bootstrapping rule because that choice "will require only the smallest change in the approach of [the] * * * lower federal courts" (Br. 23). There are several answers to this claim. First, several of the courts of appeals have evidently adhered to the bootstrapping rule simply because they felt bound by this Court's decision in

Glasser, in the absence of a clear signal from this Court that the language in *Glasser* has not survived the adoption of Rule 104(a). See *United States* v. *James*, 590 F.2d at 581; *United States* v. *Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978); *United States* v. *Petrozziello*, 548 F.2d at 23 n.2. The acquiescence of lower courts in a prior decision of this Court should be entitled to no persuasive weight as a justification for the earlier rule.

Moreover, the "approach" of the circuit courts is not as clear-cut as petitioner suggests. The First and Sixth Circuits have held that Rule 104(a) overrules the bootstrapping rule. See, *e.g.*, *United States* v. *Vinson*, 606 F.2d 149, 153 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980); *United States* v. *Martorano*, 561 F.2d 406, 408 (1st Cir. 1977), cert. denied, 435 U.S. 922 (1978). See also *United States* v. *Drougas*, 748 F.2d 8, 29 (1st Cir. 1984). The Second Circuit, while applying the bootstrapping rule, has intimated in recent decisions that Rule 104(a) may require a different result. See, *e.g.*, *United States* v. *DeJesus*, 806 F.2d 31, 34 (1986); *United States* v. *Cicale*, 691 F.2d 95, 103 n.3 (1982), cert. denied, 460 U.S. 1082 (1983). Two other circuits that observe the bootstrapping rule have noted, but not resolved, the apparent conflict between that rule and Rule 104(a). See *United States* v. *Jackson*, 627 F.2d 1198, 1215-1216 n.34 (D.C. Cir. 1980); *United States* v. *Santiago*, 582 F.2d 1128, 1133 n.11 (7th Cir. 1978).[11]

Only three circuits, as far as we can tell, have expressly held that Rule 104(a) does not overrule the bootstrapping rule, but none of the three has provided a convincing rationale for that conclusion. The Fifth Circuit adhered to the bootstrapping rule in *United States* v. *James*, *supra*, but it did so without offering a reason. See 590 F.2d at

[11] The Fourth and Tenth Circuits, which also apply the bootstrapping rule, see, *e.g.*, *United States* v. *Gresko*, 632 F.2d 1128, 1131 (4th Cir. 1980); *United States* v. *Andrews*, 585 F.2d 961, 966 (10th Cir. 1978), have apparently not addressed the impact of Rule 104(a).

581. We believe that the extensive and well-considered concurring opinion of Judge Tjoflat (*id.* at 584-594) has much the better of the argument. The Third Circuit reached the same result, on the ground that without a bootstrapping rule defendants would be exposed to "idle chatter" and "inadvertently misreported and deliberately fabricated evidence." *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d at 261 (citation omitted). The Eighth Circuit took the same position. It stated, without supporting analysis, that the bootstrapping rule is "an important safeguard." *United States* v. *Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978). This array of views hardly constitutes a uniform and persuasive line of lower court authority in favor of the rule. In sum, the lower court decisions, responding to the perceived compulsion of language in this Court's decision in *Glasser*, have accorded too little respect to the experience of trial judges and have contravened the considerable discretion intentionally given to trial courts under Rule 104(a).

4. If the Court agrees with petitioner that the bootstrapping rule should be retained, the Court should make clear that the rule applies only to the hearsay components of the co-conspirator declarations under consideration. When a co-conspirator statement is admissible on other grounds—either because it is not offered for its truth or because it falls within a separate hearsay exception or exemption—the bootstrapping rule does not apply. In the present case, nearly all of the co-conspirator statements offered against petitioner were admissible independent of Rule 801(d)(2)(E). The trial court was therefore correct in relying on those co-conspirator statements in deciding whether the remaining co-conspirator statements were admissible under Rule 801(d)(2)(E).

This Court considered a similar issue in *Anderson* v. *United States*, 417 U.S. 211 (1974). The *Anderson* case involved a prosecution for conspiracy to cast fictitious votes

in federal, state, and local elections. At trial, the government offered against all of the defendants certain out-of-court statements made by two of the defendants. Petitioners argued that the statements did not fall within the co-conspirator exception since, in their view, the conspiracy had ended before the statements were made. Rejecting that contention, the Court held that because the statements were not hearsay in the first place, there was no need to decide whether the requirements of the co-conspirator exception had been met. The Court observed that the prerequisites of the co-conspirator exception are only of concern where "the declaration would otherwise be hearsay." 417 U.S. at 219.

In *Anderson,* co-conspirator statements, admissible as nonhearsay, were used as evidence of the conspiracy charged in the indictment. There is no reason to take a different view when the inquiry is whether there is sufficient proof of the existence and membership of a conspiracy to warrant a finding of admissibility under Rule 801(d)(2)(E). Where a co-conspirator statement is admissible on some basis other than Rule 801(d)(2)(E) itself, a trial court should not shrink from using that statement to support a finding that the prerequisites of Rule 801(d)(2)(E) have been satisfied.

This principle has been widely recognized by the courts of appeals. In finding sufficient "independent" evidence of the conspiracy, courts have relied, for example, on co-conspirator statements that they found admissible as non-assertions and therefore not "statements" under Rule 801(a) (see, *e.g., United States* v. *Perez*, 658 F.2d 654, 659 (9th Cir. 1981)); co-conspirator statements that constituted adoptive admissions under Rule 801(d)(2)(B) (see, *e.g., United States* v. *Andrus*, 775 F.2d 825, 839-840 (7th Cir. 1985); *United States* v. *Carter*, 760 F.2d 1568, 1579-1581 (11th Cir. 1985)); co-conspirator statements that were admissible as declarations against penal interest

under Rule 804(b)(3) (see, *e.g., United States* v. *Dekle*, 768 F.2d 1257, 1262 (11th Cir. 1985)); and co-conspirator statements that were admissible as "state of mind" evidence under Rule 803(3) (see, *e.g., United States* v. *De-Jesus*, 806 F.2d 31, 35 (2d Cir. 1986); *United States* v. *Cicale*, 691 F.2d 95, 104 (2d Cir. 1982), cert. denied, 460 U.S. 1082 (1983)).

Co-conspirator statements often consist of warnings or orders from one conspirator to another. Statements of this sort are admissible not because of the truth of the matter asserted, but because the fact that they were made tends to prove the existence and membership of the conspiracy. Courts have routinely relied on co-conspirator statements of this kind in upholding findings under Rule 801(d)(2)(E). See, *e.g., United States* v. *Shepherd*, 739 F.2d 510, 514 (10th Cir. 1984) (in concluding that the prerequisites of Rule 801(d)(2)(E) were met, court relied, in part, on orders given by one co-conspirator to another; held, "[a]n order or instruction is, by its nature, neither true nor false and thus cannot be offered for its truth"); *United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975), cert. denied, 423 U.S. 1058 (1976) (instructions given by one confederate to another were "verbal acts" and thus could be relied on in making a Rule 801(d)(2)(E) finding). See also *United States* v. *Miller*, 771 F.2d 1219, 1233 (9th Cir. 1985); *United States* v. *Tuchow*, 768 F.2d 855, 868 (7th Cir. 1985); *United States* v. *Gibson*, 675 F.2d 825, 834 (6th Cir.), cert. denied, 459 U.S. 972 (1982).[12]

In the present case, the government relied on several co-conspirator statements in arguing that there was sufficient proof of the existence and membership of the conspiracy.

[12] In some cases, the simple fact that a co-conspirator statement was made tends, without more, to show a connection between the declarant and the defendant and is thus evidence of the existence and membership of the conspiracy. See, *e.g., United States* v. *Lopez*, 584 F.2d 1175, 1179 (2d Cir. 1978), cert. denied, No. 84-6993 (Jan. 13, 1986).

First, the government cited (Tr. 984) Lonardo's May 12 statement that he would "try to contact some people" but that he did not want his contacts to know who he was dealing with. Lonardo's expression of his intention to contact other persons was admissible under Rule 803(3) as evidence of his state of mind. Lonardo's statement that he did not want his contacts to know who he was dealing with is not hearsay at all: the mere fact that he made that statement tends to prove that a secret operation was afoot.

The government relied next (Tr. 985) on Lonardo's direction to Greathouse about where to deliver the cocaine. That was an order and thus not a hearsay declaration at all. The government also noted (*ibid.*) that Lonardo and Greathouse reached an agreement on price. Once again, it was the fact of agreement that was relevant to prove the existence of the conspiracy, and that fact was not hearsay. Finally, the government relied (Tr. 985-986) on Lonardo's May 24 and 25 instructions to Greathouse that (1) the deal would not take place at the Sheraton Hotel but rather would be consummated at the Hilton; (2) that once Greathouse arrived in the lobby he was to give Lonardo his car keys; and (3) that Lonardo's "friend" would be out in his car and Lonardo would "just go over and, you know" (Tr. 986). Those statements were admissible both as state of mind evidence and as directions whose admissibility did not turn on the truth of any of the contents of the statements.

The only arguably hearsay statement relied on by the government in supporting the Rule 801(d)(2)(E) finding was Lonardo's May 25 statement in which he reported to Greathouse that his "friend" was with him and had some questions to ask about the "trees" (Tr. 985-986). If the bootstrapping rule is retained, that statement would not be available to support a finding under Rule 801(d)(2)(E). But in light of the other evidence in the case—both the remaining co-conspirator statements that were independently admissible and the non-hearsay evidence of petitioner's activities in the Hilton parking lot before and during the cocaine transaction—the trial court's determination (Tr. 989) that there was proof by a preponderance of the evidence that a conspiracy existed and that Lonardo and petitioner were members of it could not possibly be regarded as clearly erroneous.[13] Thus, even if the Court is persuaded that the bootstrapping rule should be retained, the trial court's ruling that the requirements of Rule 801(d)(2)(E) were met should be affirmed.

II. THE "PREPONDERANCE OF THE EVIDENCE" STANDARD SHOULD APPLY TO A COURT'S FINDINGS ON THE ADMISSIBILITY OF CO-CONSPIRATOR DECLARATIONS

We agree with petitioner that the findings made by a court in determining whether to admit evidence under Rule 801(d)(2)(E) should be subject to the preponderance of the evidence standard.

In the closely related context of suppression motions, this Court has held that the preponderance standard is the correct standard for determining the admissibility of evidence. In *Lego* v. *Twomey*, 404 U.S. 477 (1972), a plurality of the Court held that the preponderance standard should govern the question whether a defendant's confession was voluntary and thus admissible at trial. The Court observed (404 U.S. at 488) that from its "experi-

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[13] Like any other factual finding, a trial court's determination that the requirements of Rule 801(d)(2)(E) have been satisfied is reviewable under the clearly erroneous standard. See, *e.g.*, *United States* v. *Andrus*, 775 F.2d at 840; *United States* v. *Lopez*, 758 F.2d 1517, 1520 (11th Cir. 1985), cert. denied, No. 84-6993 (Jan. 13, 1986); *United States* v. *Singer*, 732 F.2d 631, 636 (8th Cir. 1984); *United States* v. *Winship*, 724 F.2d 1116, 1122 (5th Cir. 1984); *United States* v. *Arruda*, 715 F.2d 671, 684 (1st Cir. 1983); *United States* v. *Romano*, 684 F. 2d 1057, 1066 (2d Cir.), cert. denied, 459 U.S. 1016 (1982); see also *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

ence over [a] period of time no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence." The Court could find "nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard." *Ibid.*

The Court has since held that the preponderance standard applies to determinations of the sufficiency of a consent to search (*Matlock*, 415 U.S. at 177-178 n.14), to the question whether evidence would have inevitably been discovered (*Nix* v. *Williams,* 467 U.S. 431, 444 & n.5 (1984)), and, most recently, to determinations of the sufficiency of a waiver of *Miranda* rights (*Colorado* v. *Connelly,* No. 85-660 (Dec. 10, 1986), slip op. 9-11). See also *United States* v. *Raddatz,* 447 U.S. 667, 678 & n.5 (1980).

There is no reason no apply a different standard to the admissibility of co-conspirator declarations. As in the suppression context, there is no suggestion "that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard" (*Lego,* 404 U.S. at 488). Moreover, the defendant is amply protected at trial from the admission of possibly unreliable evidence by the rigorous standard of proof beyond a reasonable doubt that the government must satisfy in order to obtain a conviction. See *United States* v. *Jackson,* 627 F.2d 1198, 1219 (D.C. Cir. 1980); *United States* v. *Bell,* 573 F.2d 1040, 1044 (8th Cir. 1978).

The preponderance standard has been adopted by the great majority of lower courts.[14] The only courts that have

[14] See *United States* v. *Chindawongse,* 771 F.2d 840, 844 (4th Cir. 1985), cert. denied, No. 85-5862 (Jan. 21, 1986); *United States* v. *Dougas,* 748 F.2d 8, 28 (1st Cir. 1984); *United States* v. *DeJesus,* 806 F.2d 31, 34 (2d Cir. 1986); *United States* v. *Ammar,* 714 F.2d 238, 249-251 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *James,* 590 F.2d 575, 582-583 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Vinson,* 606 F.2d 149, 152 (6th Cir.),

suggested a different standard have adopted an apparently less exacting one—either "substantial" evidence or evidence sufficient to take a case to a jury.[15] Those lower standards, like the "bootstrapping rule," are vestiges from the time prior to the adoption of the Federal Rules of Evidence, when juries were given final responsibility for ruling on the admissibility of co-conspirator declarations. Those standards are therefore inconsistent with the current system in which the court has the exclusive responsibility for determining the admissibility of co-conspirator statements after making the preliminary findings required by Rule 801(d)(2)(E). See *United States* v. *Petrozziello,* 548 F.2d at 22-23. For that reason, the district court in this case was correct in applying the "preponderance" test that is employed in most circuits.

III. THE CONFRONTATION CLAUSE DOES NOT REQUIRE AN INDEPENDENT ASSESSMENT OF THE RELIABILITY OF A CO-CONSPIRATOR DECLARATION

The final question presented in this case is whether, after finding a co-conspirator declaration to be admissible under Rule 801(d)(2)(E), a court must conduct a separate inquiry to determine if the statement carries with it sufficient indicia of reliability to satisfy the Confrontation Clause. We submit that such an inquiry should not be re-

cert. denied, 444 U.S. 1074 (1980); *United States* v. *Jefferson,* 714 F.2d 689, 696 (7th Cir. 1983); *Bell,* 573 F.2d at 1044; *United States* v. *Andrews,* 585 F.2d 961, 965 (10th Cir. 1978). The preponderance standard is, moreover, applied by all circuits in civil cases.

[15] See, *e.g., United States* v. *Jackson,* 627 F.2d 1198, 1219 (D.C. Cir. 1980) (substantial evidence); *United States* v. *Weiner,* 578 F.2d 757, 768 (9th Cir.), cert. denied, 439 U.S. 981 (1978) ("sufficient * * * evidence to establish a prima facie case").

quired, because a statement that is admissible under the traditional co-conspirator rule is sufficiently reliable to satisfy Confrontation Clause concerns.[16]

A. Because The Co-Conspirator Rule Is A "Firmly Rooted Hearsay Exception," Statements Admitted Under The Rule Satisfy The Confrontation Clause

In *Ohio* v. *Roberts,* 448 U.S. 56 (1980), this Court recognized (448 U.S. at 65-66) that out-of-court statements offered at trial ordinarily must be shown to be reliable in order to satisfy the Confrontation Clause. The Court noted, however, that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection' " (*id.* at 66, quoting *Mattox* v. *United States,* 156 U.S. 237, 244 (1895)). In a case where the evidence falls within a "firmly rooted hearsay exception," the Court held, "[r]eliability can be inferred without more" (448 U.S. at 66).

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[16] The circuits are divided on this issue. Some courts have held that the Confrontation Clause requires a separate "reliability" inquiry. See *United States* v. *Gomez,* No. 84-1555 (10th Cir. Jan. 30, 1987), slip op. 12; *United States* v. *DeLuna,* 763 F.2d 897, 909-911 (8th Cir. 1985), cert. denied, No. 85-423 (Nov. 12, 1985); *United States* v. *Arbalaez,* 719 F.2d 1453, 1459-1460 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984); *United States* v. *Ammar,* 714 F.2d 238, 254-257 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Wright,* 588 F.2d 31, 37-38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979). Other circuits have held that a statement admissible under Rule 801(d)(2)(E) satisfies the Confrontation Clause without the need for a separate inquiry into the reliability of the statement. See, *e.g., United States* v. *Chindawongse,* 771 F.2d 840, 845-847 (4th Cir. 1985), cert. denied, No. 85-5862 (Jan. 21, 1986); *United States* v. *Kendall,* 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); *United States* v. *Peacock,* 654 F.2d 339, 349 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983); *United States* v. *McManus,* 560 F.2d 747 (6th Cir. 1977), cert. denied, 434 U.S. 1047 (1978); *Ottomano* v. *United States,* 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973).

The Court in *Roberts* identified two reasons to justify this categorical approach to the reliability of statements admissible under "firmly rooted" hearsay exceptions. First, the hearsay rules and the Confrontation Clause stem from the same historical roots and were designed to promote similar values. 448 U.S. at 66. As the Court put the matter in *Salinger* v. *United States,* 272 U.S. 542, 548 (1926), "[t]he right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of [the Confrontation Clause] * * * is to continue and preserve that right, and not to broaden it or disturb the exceptions." Second, the categorical approach "responds to the need for certainty in the workaday world of conducting criminal trials." *Roberts,* 448 U.S. at 66. Trial courts and litigants, who work with the rules of evidence on a daily basis, depend on "certainty and consistency in the application of the Confrontation Clause." *Id.* at 73 n.12.

The categorical approach outlined in *Roberts* is appropriate for co-conspirator declarations, because the co-conspirator rule is a "firmly rooted" exception to the rule against hearsay. As we discussed at length in our brief in *United States* v. *Inadi,* No. 84-1580 (Mar. 10, 1986), the rule allowing the admission of co-conspirator declarations had already emerged in England at the time of the adoption of the Sixth Amendment.[17] In this country, the co-conspirator rule was adopted by the Supreme Court of New Jersey in 1791, the very year in which the Bill of

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[17] See *Trial of Daniel Dammaree,* 15 State Tr. 522 (1710); *Trial of Lord George Gordon,* 21 State Tr. 522, 526-527, 529-540 (1781); *Trial of Thomas Hardy,* 24 State Tr. 200, 454 (1794); *Trial of John Horne Tooke,* 25 State Tr. 1 (1794); *Trial of William Stone,* 25 State Tr. 1155, 1277-1278 (1794). See Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis,* 85 Harv. L. Rev. 1378, 1383 & n.29 (1972). We have furnished petitioner with a copy of our brief in *Inadi.*

Rights was ratified. *Patton* v. *Freeman,* 1 N.J.L. 113, 115 (1791). Similar decisions were soon handed down by the highest courts of Vermont, Virginia, and Pennsylvania. *Broughton* v. *Ward,* 1 Tyl. 137, 139 (Vt. 1801); *Claytor* v. *Anthony,* 27 Va. (6 Rand.) 285, 300-301 (1828); *Reitenbach* v. *Reitenbach,* 1 Rawle 362, 365 (Pa. 1829).

This Court first recognized the co-conspirator exception more than a century and a half ago in *American Fur Co.* v. *United States,* 27 U.S. (2 Pet.) 358, 364-365 (1829). Since then, the Court has repeatedly reaffirmed it.[18] Rule 801(d)(2)(E), which was proposed by this Court and adopted without change, codifies the co-conspirator rule in precisely the form recognized at common law and in the earliest evidence treatises. See, *e.g.,* 1 S. Greenleaf, *A Treatise on the Law of Evidence* § 184 a, at 304-306 (16th ed. 1899); 2 F. Wharton, *Wharton's Evidence in Criminal Cases* § 699, at 1183 (11th ed. 1935). See Note, *Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Co-conspirator Hearsay,* 53 Fordham L. Rev. 1291, 1297 n.39 (1985). Moreover, almost every state has adopted the co-conspirator rule, either by statute or caselaw, in a form essentially the same as the common-law rule and Rule 801(d)(2)(E).[19]

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[18] See, *e.g., United States* v. *Nixon,* 418 U.S. 683, 701 (1974); *Anderson* v. *United States,* 417 U.S. 211, 218 (1974); *Wong Sun* v. *United States,* 371 U.S. 471, 490 (1963); *Lutwak* v. *United States,* 344 U.S. 604, 617-618 (1953); *Krulewitch* v. *United States,* 336 U.S. 440, 443 (1949) (describing the co-conspirator rule as "firmly established"); *Glasser* v. *United States,* 315 U.S. 60, 74-75 (1942); *Wiborg* v. *United States,* 163 U.S. 632, 657-658 (1896); *Logan* v. *United States,* 144 U.S. 263, 308-309 (1892); *Nudd* v. *Burrows,* 91 U.S. 426, 438 (1875).

[19] Twenty-six states have rules of evidence identical to Rule 801(d)(2)(E): Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Iowa, Minnesota, Mississippi, Montana, Nebraska (Neb. Rev. Stat. § 27-801(4)(b)(v) (1985)), Nevada (Nev. Rev. Stat. Ann. § 51.035(3)(e) (1967)), New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma (Okla. Stat. Ann. tit. 12, § 2801(4)(b)(5) (1980)), Oregon (Ore. R. Evid. 801(4)(b)(E) (1984)), South Dakota (S.D. Codified Laws Ann. § 19-16-3(5) (1979)), Texas (Tex. R. Evid. 801(e)(2)(E) (1985)), Utah, Vermont, Washington, West Virginia, Wisconsin (Wis. Stat. Ann. § 908.01(4)(b)(5) (1975)), and Wyoming. Nine states have rules of evidence similar to Rule 801(d)(2)(E): California (Cal. Evid. Code § 1223 (West 1966)), Delaware, Florida (Fla. Stat. Ann. § 90.803(18) (West 1979)), Kansas (Kan. Stat. Ann.§ 60-460(i)(2) (1983)), Louisiana (La. Rev. Stat. tit. 15, § 455 (1981)), Maine, Michigan, New Jersey (N.J. R. Evid. 63(9)(b)), and Ohio. Fourteen states have adopted the co-conspirator exception by court decision. See, *e.g., Leonard* v. *State,* 459 So.2d 970, 972 (Ala. Crim. App. 1984); *State* v. *Tropiano,* 158 Conn. 412, 423, 262 A.2d 147, 152 (1969), cert. denied, 398 U.S. 949 (1970); *People* v. *Goodman,* 81 Ill. 2d 278, 283, 408 N.E.2d 215, 216 (1980); *Wallace* v. *State,* 426 N.E.2d 34, 42-43 (Ind. 1981); *Napier* v. *Commonwealth,* 515 S.W.2d 615, 616 (Ky. 1974); *Thomas* v. *State,* 492 A.2d 939 (Md. App. 1985); *Commonwealth* v. *Bongarzone,* 390 Mass. 326, 340, 455 N.E.2d 1183, 1192, (1983); *State* v. *Cornman,* 695 S.W.2d 443, 447 (Mo. 1985); *People* v. *Sanders,* 56 N.Y. 2d 51, 436 N.E.2d 480, 451 N.Y.S.2d 30 (1982); *Commonwealth* v. *Dreibelbis,* 493 Pa. 466, 475, 426 A.2d 1111, 1115 (1981); *State* v. *Bracero,* 434 A.2d 286, 289 (R.I. 1981); *State* v. *Sullivan,* 277 S.C. 35, 42, 282 S.E.2d 838, 842 (1981); *State* v. *Thomas,* 691 S.W.2d 571, 572 (Tenn. Crim. App. 1985); *Anderson* v. *Commonwealth,* 215 Va. 21, 24, 205 S.E.2d 393, 395 (1974). Georgia has adopted the co-conspirator rule by statute (Ga. Code Ann. § 24-3-5 (1982), but the Georgia courts have construed that state's rule more broadly than the common law and federal rule. See *Dutton* v. *Evans,* 400 U.S. 74 (1970).

The Court's cases dealing with the co-conspirator exception confirm that—consistent with the categorical approach outlined in *Roberts*—there is no warrant for subjecting admissible co-conspirator declarations to further scrutiny under the Confrontation Clause. None of the many cases dealing with the co-conspirator exception has suggested that evidence admissible under that exception may nonetheless fail to satisfy the requirements of the Sixth Amendment. In fact, in the one instance in which such a confrontation claim was made, the Court readily dismissed it. In *Delaney* v. *United States,* 263 U.S. 586

(1924), a defendant challenged the admission of a co-conspirator statement, in part on Confrontation Clause grounds. The Court acknowledged that some hearsay may run afoul of the right to confrontation (263 U.S. at 590).[20] But co-conspirator statements, the Court held, are "competent and within the ruling of the cases" when they are made "during the progress of the conspiracy." (*ibid*).

More recently, in *United States* v. *Inadi, supra,* the Court applied the categorical approach to a claim that the Confrontation Clause requires the government either to produce the co-conspirator declarant or to show that he is unavailable. Concluding that the benefits of such a rule would be slight and the burdens substantial, the Court declined to require a showing of the declarant's unavailability as a prerequisite to the admission of co-conspirator declarations in any case, even though live testimony from the declarant might be valuable in particular instances. *Inadi,* slip op. 11-12.

This Court's decision in *Dutton* v. *Evans,* 400 U.S. 74 (1970), does not undermine the categorical approach or support the proposition that a separate reliability inquiry is necessary in cases involving co-conspirator declarations. In *Dutton,* the Court considered a statement that had been admitted under a novel variant of the traditional co-conspirator rule. The state co-conspirator exception at issue in *Dutton* permitted the admission of a statement made by a conspirator after the conspiracy had ended. The plurality upheld the admission of the statement after determining that it bore "indicia of reliability" (*id.* at 89)

[20] For this proposition, the Court relied principally on *Diaz* v. *United States,* 223 U.S. 442, 450 (1912), involving prior testimony, and *Spiller* v. *Atchison, Topeka & Santa Fe Ry.,* 253 U.S. 117, 130 (1920), involving statements of various third parties gathered and summarized by a single witness at trial.

and that the defendants could not have benefited significantly from cross-examining the declarant (*ibid.*).[21]

The plurality in *Dutton* was at pains to point out that its careful scrutiny of the co-conspirator statement in that case was triggered by the unusual nature of the state's hearsay rule. The plurality opinion made it clear that it did not mean to "require a constitutional reassessment of every established hearsay exception" (400 U.S. at 80); in fact, the Court specifically noted that it was not "question[ing] the validity of the co-conspirator exception applied in the federal courts" (*ibid.*).

Petitioner seeks to minimize the degree of his disagreement with this analysis by acknowledging (Br. 35) that evidence that meets the requirements of Rule 801(d)(2)(E) should ordinarily satisfy the Confrontation Clause as well. He contends, however, that there may be "unusual cases" (Br. 37) in which a court should conduct a separate reliability inquiry.[22] Those "unusual cases," petitioner suggests, will be "those in which a defendant specifically ob-

[21] Justice Harlan concurred in the result in *Dutton* on the ground that the Confrontation Clause was not applicable at all. 400 U.S. at 93-97. In the course of his opinion, Justice Harlan made it clear that he did not approve of interpreting the Confrontation Clause in a manner that would render it "a threat to much of the existing law of evidence and to future developments in that field" (*id.* at 94).

[22] Petitioner tempers even this limited concession by insisting that a reliability inquiry is unnecessary only if the Court retains the rule against "bootstrapping" (Br. 31 n.38, 35). But there is no justification for this qualification. Under Rule 104(a), the district court will rely on the co-conspirator declarations to support its finding of conspiracy only if it finds those statements to be reliable. Thus, if the court finds that the co-conspirator declarations are not trustworthy, the court will not rely on them in making its admissibility ruling. In that event, the abandonment of the bootstrapping rule will not affect the case. On the other hand, if the court decides to rely on the declarations because they are especially trustworthy under all the circumstances, there will be no need for a separate (and redundant) reliability inquiry under the Confrontation Clause.

jects on Confrontation Clause grounds and articulates reasons why co-conspirator statements are not only crucial in the case, but also are unusually unreliable" (Br. 36).

Contrary to petitioner's prognosis, we doubt that such claims would be rare. As long as there is some prospect of excluding damaging evidence on Confrontation Clause grounds, defense counsel will have an incentive to press reliability claims in virtually every case. And there will be many such cases, since "[t]he co-conspirator rule apparently is the most frequently used exception to the hearsay rule" (*Inadi*, slip op. 11). If the Court is to employ the categorical approach and minimize the burden of litigation over the Confrontation Clause issue, it will not be well served by a rule purporting to limit Confrontation Clause claims to some loosely defined class of "rare cases."

B. The Requirements Of The Co-conspirator Rule Afford Substantial Guarantees Of Reliability

Apart from the status of the co-conspirator rule as a firmly rooted hearsay exception, the prerequisites to admissibility in Rule 801(d)(2)(E) help ensure that evidence admitted under the rule is reliable. For that reason as well, there is no need for an independent inquiry into the reliability of each statement that is introduced as a co-conspirator declaration. See S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 728 (4th ed. 1986).

1. The requirement that a co-conspirator declaration be made during the conspiracy and in furtherance of its goals supports the reliability of the declaration in several ways. First, when conspirators are working toward a common goal, the reliability of their statements in furtherance of that goal is enhanced. Experience suggests that declarants who are reacting to, planning, or carrying out significant events in the operation of a conspiracy are unlikely to misreport those important events to their associates. See *United States* v. *DeLuna*, 763 F.2d 897,

910-911 & n.3 (8th Cir. 1985), cert. denied, No. 85-423 (Nov. 12, 1985); *United States* v. *Southland Corp.*, 760 F.2d 1366, 1377 (2d Cir. 1985), cert. denied, No. 84-1951 (Oct. 7, 1985); *United States* v. *Ammar*, 714 F.2d 238, 256-257 & n.16 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Wright*, 588 F.2d at 37-38. Moreover, because the statements must be made during the life of the conspiracy, they are unlikely to be the product of faulty recollection. *United States* v. *McGrath*, 613 F.2d 361, 368 (2d Cir. 1979), cert. denied, 446 U.S. 967 (1980); *United States* v. *Wright*, 588 F.2d at 38.

Second, as the Court observed in *Dutton* v. *Evans*, 400 U.S. at 88-89, statements made in furtherance of an illegal enterprise are inherently against the declarant's penal interest, which further decreases the likelihood that the statements will be false or mistaken. Accord *Lee*, slip op. 4-5 (Blackmun, J., dissenting). See also *United States* v. *Pagan*, 721 F.2d 24, 31 (2d Cir. 1983); *United States* v. *Perez*, 702 F.2d 33, 37 (2d Cir.), cert. denied, 462 U.S. 1108 (1983); *United States* v. *Perez*, 658 F.2d 654, 662 (9th Cir. 1981).

Third, the "in furtherance" requirement has the effect of screening out idle chatter, as well as inadvertently misreported and deliberately fabricated statements, since those statements do not advance the goals of the conspiracy. For that reason as well, the rule itself helps guarantee the reliability of the statements admitted under its authority. See 4 J. Weinstein & M. Berger, *supra*, ¶ 801(D)(2)(E)[01]. See also *Krulewitch* v. *United States*, 336 U.S. 440, 443-444 (1949); *United States* v. *Fahey*, 769 F.2d 829, 838-839 (1st Cir. 1985); *United States* v. *Annunziato*, 293 F.2d 373 (2d Cir. 1961).

Fourth, the requirement that the declarant and the defendant be shown to be co-conspirators makes it more likely that the declarant will be well aware of the defendant's role in the enterprise and his efforts to ensure its

success. See *Dutton* v. *Evans,* 400 U.S. at 88-89. Again, this factor reduces the risk that the information contained in the statement will be false.

Finally, because co-conspirator declarations, to be admissible, must be made in the course of the conspiracy, they are in some respects even more reliable than in-court testimony. This Court made that point in *Inadi,* where it explained that statements made while the conspiracy is in progress "provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court" (*Inadi,* slip op. 7). For example, when the government offers the statement of one drug dealer to another in furtherance of an illegal conspiracy (*ibid.*)

> the statement often will derive its significance from the circumstances in which it was made. Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand. Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy.

For that reason, the Court noted, co-conspirator declarations "are usually irreplaceable as substantive evidence" (*id.* at 8).

Because the requirements of Rule 801(d)(2)(E) typically ensure the reliability of admissible co-conspirator statements, it is not surprising that, to our knowledge, no court of appeals has ever held that a statement otherwise admissible under the co-conspirator exemption was too unreliable to submit to the jury. See Note, *Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Co-conspirator Hearsay,* 53 Fordham L. Rev. 1291, 1315-1316 (1985). Indeed, the courts that insist on performing a separate

reliability test rely on factors that duplicate, to a large extent, the inquiry already required by Rule 801(d)(2)(E) to admit a co-conspirator statement.

For example, some courts have found indicia of reliability in the fact that the declarant made the statements to other members of the conspiracy. See, *e.g.*, *United States* v. *DeLuna,* 763 F.2d 897, 910-911 & n.3 (8th Cir. 1985), cert. denied, No. 85-423 (Nov. 12, 1985); *United States* v. *Ammar,* 714 F.2d 238, 257 n.16 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Fleishman,* 684 F.2d 1329, 1340 (9th Cir.), cert. denied, 459 U.S. 1044 (1982). That factor, however, largely duplicates the requirements that the declarant and defendant be part of the same conspiracy and that the statement be made during the life of the conspiracy. Other courts have found reliability in the fact that the statements are "part of an on-going transaction." *United States* v. *Arbelaez,* 719 F.2d 1453, 1460 (9th Cir. 1983). That factor likewise duplicates the pendency requirement. The search for corroborating evidence, which some courts find to be the best guarantee of reliability (see, *e.g.*, *Ammar,* 714 F.2d at 256-257; *Fleishman,* 684 F.2d at 1340), largely duplicates the trial court's obligation under Rule 801(d)(2)(E) to determine whether the evidence establishes the prerequisites for admissibility.

2. In considering whether the requirements of Rule 801(d)(2)(E) are constitutionally inadequate and must be supplemented with a reliability analysis, it is important to note that besides being the product of a long common-law heritage, the co-conspirator rule is the product of a intensive deliberative process that culminated in the adoption of the Federal Rules of Evidence. That process involved both the rulemaking authority of this Court and the legislative power of Congress. The hearsay exceptions that

emerged from this process were forged with full consideration of the requirements of reliability imposed by the Confrontation Clause.

When it was developing the proposed Federal Rules of Evidence, the Advisory Committee carefully considered whether each of the hearsay exceptions possessed sufficient "guarantees of trustworthiness." Fed. R. Evid. art. VIII advisory committee note, 46 F.R.D. 161, 325 (1969). The scheme was then reviewed, revised, and adopted by this Court. 56 F.R.D. 183 (1972). After receiving the rules from this Court, "Congress extensively reviewed [the Court's] submission, and considerably revised it" (*United States* v. *Abel,* 469 U.S. at 49). See Pub. L. No. 93-595, § 1, 88 Stat. 1926.

Most of the changes made by Congress in the proposed rules were designed to augment the reliability of evidence admitted at trial. For example, Congress amended the hearsay exception for records of regularly conducted activities, codified in Rule 803(6), to provide "further assurance of * * * trustworthiness." H.R. Rep. 93-650, 93d Cong., 1st Sess. (1973). Changes designed to ensure reliability were also made in the proposed rules governing prior inconsistent statements (Rule 801(d)(1)(A)), see Report of the Committe on the Judiciary, H.R. Rep. 93-650, *supra,* at 13; dying declarations (Rule 804(b)(2)), see H.R. Rep. 93-650, *supra*; and declarations against interest (Rule 804(b)(3)), see *ibid.*

Although Congress was clearly sensitive to the issue of reliability, it enacted Rule 801(d)(2)(E) in precisely the form in which this Court promulgated it. 56 F.R.D. 183, 293 (1972). Indeed, from the Preliminary Draft of The Proposed Rules of Evidence submitted by the Advisory Committee of the Judicial Conference in March 1969 (see 46 F.R.D. 161, 331 (1969); Rule 801(c)(3)(v)), through the final version of the Rules submitted by this Court to Con-

gress and passed by Congress in 1975, Pub. L. No. 93-595, Art. VIII, 88 Stat. 1938, the co-conspirator exception remained unchanged. This was not an oversight. After the House adopted the co-conspirator rule in the form promulgated by the Court, Senator McClellan proposed that the "in furtherance" requirement be deleted and in its place two new requirements be added: (1) that there be independent circumstantial guarantees of trustworthiness; and (2) that the statement be relevant to the character or the execution of the conspiracy itself. *Rules of Evidence (Supplement), Hearings on the Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary,* 93d Cong., lst Sess. 56, 58, 59 (1973). Congress refused to enact these changes.[23] See *United States* v. *Harris,* 546 F.2d 234, 237 & n.4 (8th Cir. 1976). In view of Congress's close attention to reliability concerns when it was considering the Rules of Evidence, this Court should not lightly conclude that Rule 801(d)(2)(E) is inconsistent in many of its applications with the requirements of the Confrontation Clause. See *Rostker* v. *Goldberg,* 453 U.S. 57, 64 (1981); see also *Walters* v. *National Ass'n of Radiation Survivors,* No. 84-571 (June 28, 1985), slip op. 13; *Schweiker* v. *McClure,* 456 U.S. 188 (1982).

3. We do not contend that Rule 801(d)(2)(E) guarantees that each co-conspirator statement submitted to the jury will be entirely trustworthy; no class of evidence can meet that standard. But to the extent that Rule 801(d)(2)(E) fails to assure complete reliability, any shortfall should affect only the weight of the evidence, not its admissibility. To require the trial judge to apply an

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[23] Similar, and equally unsuccessful, efforts to change the requirements of the co-conspirator rule had been directed to the Advisory Committee. See E. Cleary, *McCormick's Evidence* § 267, at 793 (3d ed. 1984).

exacting standard of reliability to otherwise admissible co-conspirator statements would allocate to the judge a responsibility that is properly reserved for the jury. See *Watkins* v. *Sowders,* 449 U.S. 341, 347 (1981); *Manson* v. *Brathwaite,* 432 U.S. 98, 113 n.14 (1977). As this Court noted in *Barefoot* v. *Estelle,* 463 U.S. 880, 898 (1983), "the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder." A constitutional claim that otherwise admissible evidence should be kept from the jury solely on reliability grounds, the Court said, "is founded on the premise that a jury will not be able to separate the wheat from the chaff" (463 U.S. at 901 n.7). The Court added that it did not "share in this low evaluation of the adversary process" (*ibid.*).

The contention that the district court should screen co-conspirator declarations for reliability also ignores the procedures available to a defendant to challenge co-conspirator statements that he believes to be unreliable. Fed. R. Evid. 806 permits a defendant to attack the credibility of a hearsay declarant, including the maker of a co-conspirator declaration, with any evidence that would have been admissible if the declarant had testified as a witness. Thus, the defendant may offer specific instances of conduct under Fed. R. Evid. 608(b), evidence of prior convictions under Fed. R. Evid. 609, and prior inconsistent statements under Fed. R. Evid. 613 to impeach the credibility of the declarant.[24] Evidence of the declarant's

[24] See, *e.g., United States* v. *Noble,* 754 F.2d 1324, 1330-1332 (7th Cir. 1985) (prior convictions); *United States* v. *Coachman,* 727 F.2d 1293, 1297 n.13 (D.C. Cir. 1984) (same); *United States* v. *Bovain,* 708 F.2d 606, 613 (11th Cir.), cert. denied, 464 U.S. 898 (1983) (same); *United States* v. *Pizarro,* 717 F.2d 336, 350 (7th Cir. 1983), cert. denied, 471 U.S. 1139 (1985), (inconsistent statements); *United States* v. *Wuagneux,* 683 F.2d 1343, 1357 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983) (same); *United States* v. *Nardi,* 633 F.2d 972, 976 (1st Cir. 1980) (same).

bias or inability to perceive or recall is also admissible. See *United States* v. *Abel,* 469 U.S. 45, 50-51 (1984). And, of course, the defendant is always free to argue to the jury that the declarant is unworthy of belief.

For these reasons, we submit that the requirements of Rule 801(d)(2)(E) ensure that declarations admitted under the rule are sufficiently reliable to satisfy the Confrontation Clause. To require a more exacting review by the trial court would have the effect of denying to the jury its primary responsibility for weighing all the evidence in the case and rejecting that portion of the evidence that the jury finds untrustworthy.

4. Finally, a rule requiring a separate reliability inquiry in each case would impose substantial burdens on the criminal justice system without serving the Confrontation Clause's "mission [of] advanc[ing] 'the accuracy of the truth-determining process in criminal trials' " *Tennessee* v. *Street,* 471 U.S. 409, 415 (1985) (quoting *Dutton* v. *Evans,* 400 U.S. at 89). It is important to bear in mind that federal conspiracy cases do not always involve the small number of co-conspirator statements that were offered in this case. The trial of a large-scale organized crime or narcotics conspiracy may involve dozens of co-conspirators, and the prosecution may propose to offer hundreds of co-conspirator statements. In such cases, a "reliability review" would impose an unjustifiable cost on the criminal justice system by increasing the time and expense of litigating conspiracy cases at the trial level. In addition, it would "add[] another avenue of appellate review in these complex cases" (*Inadi,* slip op. 11). That burden would be magnified because the reliability test, as applied by the courts of appeals that require it, involves the consideration of a wide range of factors, some rather open-ended. See, *e.g., Ammar,* 714 F.2d at 256; *United States* v. *Perez,* 658 F.2d 654, 661 (9th Cir. 1981); *DeLuna,* 763 F.2d at 910; *Fleishman,* 684 F.2d at 1339.

If the costs of such a procedure were offset by real and substantial gains to the fairness and reliability of the criminal trial, it might be justified. In fact, however, the rule is almost all cost and no benefit. In those circuits in which defendants now have the benefit of the rule, district and appellate courts have expended substantial energy in weighing the reliability of co-conspirator declarations, yet no court of appeals has ever held that evidence admitted under Rule 801(d)(2)(E) was too unreliable to satisfy the Confrontation Clause. We cannot imagine a justification for an evidentiary rule that is so difficult to administer, but which, in practice, has so little apparent impact on the evidence admitted at trial.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

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No. 85-6725 (8)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM J. BOURJAILY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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REPLY BRIEF FOR PETITIONER

JAMES R. WILLIS
(Counsel of Record)
Suite 610, Bond Court Building
1300 East Ninth Street
Cleveland, OH 44114
(216) 523-1100

JAMES M. SHELLOW
SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, WI 53202
(414) 271-8535

STEPHEN ALLAN SALTZBURG
University of Virginia
School of Law
Charlottesville, VA 22901
(804) 924-3520
Counsel for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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SUMMARY OF THE ARGUMENT

Respondent contends that a finding that a defendant was a conspirator along with a hearsay declarant may be based wholly or partly on the declarant's out-of-court statements, notwithstanding the fact that the defendant may have no opportunity to cross-examine or to confront the declarant. Respondent's argument turns entirely upon its assertion that this Court's approach to co-conspirator statements prior to the adoption of the Federal Rules of Evidence assumed that a trial judge would not decide the admissibility of co-conspirator statements. This assertion is demonstrably false, leaving respondent's argument without a foundation.

Respondent also contends that Rule 801(d)(2)(E) broadened the admissibility of co-conspirator statements. The legislative history of the Federal Rules of Evidence indicates, however, that the opposite is true. The Advisory Committee determined that it would not classify co-conspirator statements as exceptions to the hearsay rule, because such statements were not reliable enough to be so classified, and it expressly declined to expand the scope of the rule. Respondent's further contention with respect to the Advisory Committee's and the Congress's approach to the Confrontation Clause is similarly contradicted by the legislative history of the Federal Rules of Evidence. The Advisory Committee stated in its work product and directly to Congress that it was not seeking to resolve confrontation problems in formulating its hearsay rules.

Respondent's argument that co-conspirator statements represent a firmly rooted hearsay exception fails to recognize that the scope of the co-conspirator rule today is broader than anyone could possibly have imagined when the co-conspirator rule was first adopted. Also, the posi-

tions taken by respondent in other cases and the limitations on impeachment in the Federal Rules of Evidence frequently make it impossible for a defendant against whom co-conspirator statements are offered to impeach the declarant.[1]

Respondent's arguments with respect to preliminary fact finding and the Confrontation Clause are self-contradictory. Respondent argues that this Court should depart from the firmly rooted approach of *Glasser* v. *United States*, 315 U.S. 60 (1942), and simultaneously that the Court should bar all federal courts from entertaining any Confrontation Clause attack on the admissibility of co-conspirator statements. Surely, respondent cannot have it both ways. It cannot maintain that an approach to hearsay that has previously not been recognized as valid is a long-standing rule of sufficient pedigry to immunize the approach from the Sixth Amendment.

ARGUMENT

I. THE GOVERNMENT MUST PROVE THE EXISTENCE OF A CONSPIRACY AND THE MEMBERSHIP OF THE DECLARANT AND THE DEFENDANT BY A PREPONDERANCE OF THE INDEPENDENT EVIDENCE

A. Respondent's Claim That At Common Law Federal Judges Did Not Determine The Admissibility Of Co-Conspirator Statements Is Incorrect

Respondent's argument that a trial judge may rely, wholly or in part, upon the contents of the very statements to which objection is made in finding that a defend-

[1] Furthermore, respondent fails to recognize that at common law defendants often had protections against the introduction of unreliable co-conspirator statements that are not provided under the Federal Rules of Evidence. These are discussed *infra*, at 4-5.

ant was a co-conspirator of the declarant is premised upon the following assertion: "At the time the bootstrapping rule developed, the task of determining the admissibility of co-conspirator declarations was routinely assigned to juries, not to judges." Brief for Respondent, at 10.[2] No citation accompanies this assertion, and it is belied by all of the available evidence.

For the longest time, distinguished writers on evidence pointed out that the "orthodox rule" was that judges would determine the admissibility of evidence, making necessary findings in the process, and that the admissibility of conspirator statements was a typical determination for the judge. Dean Wigmore, for example, observed that preliminary fact finding was for the trial judge and that a preponderance of the evidence standard should govern such fact finding.[3] Professors Morgan & Maguire referred to the judge's role as the original, orthodox rule.[4] Professor McCormick observed that the judge was to engage in preliminary fact finding when making admissibility decisions.[5] When the American Law Institute promulgated its Model Code of Evidence in 1942, with Professor Morgan as its reporter, the Code plainly stated that the common law practice was for the trial judge to determine the facts needed to decide on

[2] The same point is made several times in respondent's brief. *See, e.g.*, pages 6, 11, 18.

[3] *See* 1 J. Wigmore, Evidence in Trials at the Common Law § 17, at 770 (Tillers rev. 1983). *See also* 1 Wigmore § 216, at 717 & n.4 (3d ed. 1940).

[4] Morgan & Maguire, Looking Backward and Forward at Evidence, 1886-1936, 50 Harv. L. Rev. 909, 918 (1937).

[5] McCormick, The Procedure of Admitting and Excluding Evidence, 31 Tex. L. Rev. 128, 143 (1952).

admissibility and that the judge traditionally made the findings associated with vicarious admissions.[6]

This writing was not lost on the courts. Judge Learned Hand wrote in one of the most frequently cited pre-Federal Rules of Evidence decisions, *Dennis* v. *United States*, 183 F.2d 201, 230-31 (1950), *aff'd*, 341 U.S. 494 (1951), that the decision on admissibility of co-conspirator statements was for the judge. Another frequently cited case, *Carbo* v. *United States*, 314 F.2d 718, 737 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964), reiterated the *Dennis* holding and the proposition that the judge's role was the orthodox, standard common law role.

Many trial judges, concerned for the protection of the defendant, added a level of protection to the orthodox approach and instructed juries not to rely upon co-conspirator statements unless they first concluded *beyond a reasonable doubt* that a conspiracy had been proved involving the declarant and the defendant. This was a second level protection, because it was relevant only after the trial judge found a statement to be admissible. Commentators observed the phenomenon and described it as signifying a "tenderness" for the accused.[7]

This Court discussed preliminary fact finding at length in *Jackson* v. *Denno*. 378 U.S. 368 (1964). *Jackson* involved confessions, not co-conspirator statements, but

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[6] ALI, Model Code of Evidence (1942), Comment to Rule 11, at 88, Comment to Rule 508, at 249-50. Student law review notes also demonstrated an understanding that at common law the rule was that the judge would determine the admissibility of evidence. *See, e.g.*, Comment, 20 U. Chi. L. Rev. 313 (1953), discussing *United States* v. *Lutwak*, 195 F.2d 748 (1952), *aff'd*, 344 U.S. 604 (1953).

[7] *See* McCormick, *supra* note 5 at 143 n.78, specifically citing the approach of some courts to conspirator statements as an example.

the parties to the instant case have agreed that the basic approach to preliminary fact finding is similar for both. Justice White's majority opinion described the orthodox approach discussed above, the New York rule, and the Massachusetts rule. *Id.* at 377-91.[8] The Court held unconstitutional the New York approach while it expressly "raise[d] no question here concerning the Massachusetts procedure." *Id.* at 378 n.8. An appendix to the majority opinion indicated that the overwhelming majority of federal courts followed either the orthodox or the Massachusetts approach. *Id.* at 399-400.[9]

Jackson recognized the orthodox rule that the trial judge was required to find facts in ruling on the

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[8] New York assigned the bulk of the task of determining the voluntariness of a confession to the jury, with the trial judge excluding a confession only if in no circumstances could it be deemed voluntary. *Id.* at 377. The jury was required to find a confession to be voluntary before relying upon it as evidence. Massachusetts required the trial judge to engage in preliminary fact finding, but followed the "tenderness" approach in asking a jury also to consider the voluntariness of any confession that was admitted.

[9] In his dissenting opinion, Justice Black argued that a jury had a right to hear and determine the voluntariness of a confession. *Id.* at 401 (Black, J., dissenting). He stated that "[t]he New York rule does now and apparently always has put on the State the burden of convincing the jury beyond a reasonable doubt that a confession is voluntary," and argued that proof beyond a reasonable doubt should be required of the preliminary fact. *Id.* at 405 (Black, J. dissenting). Justice Harlan did not express a view on the standard of proof that should be required in his dissent.

The standard federal charge, used by trial judges who provided a second level of protection by adopting the "tenderness" approach, adopted the standard of proof advocated by Justice Black in *Jackson*, by requiring the jury to find beyond a reasonable doubt the existence of a conspiracy that included the defendant before using co-conspirator statements against that defendant. *See* E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 20.06 (3d ed. 1977).

admissibility of a variety of evidence, including co-conspirator statements, and did not disturb the second level of protection that some courts had added. But, Fed. R. Evid. 104(a) made no provision for reconsideration of preliminary questions of fact by a jury. Instead, Fed. R. Evid (104)(e) provided that once the judge determined that evidence was admissible, a party who had objected could offer other evidence "relevant to weight or credibility." Thus, the federal circuits uniformly held that a defendant was not entitled to have a jury instructed that it may reconsider a determination made by the judge in ruling on the admissibility of evidence. *See, e.g., United States* v. *Drougas*, 748 F.2d 8 (1st Cir. 1984); *United States* v. *Mastropieri*, 685 F.2d 776 (2d Cir.), *cert. denied*, 459 U.S. 945 (1982).

This history establishes that during the entire period in which this Court and the lower courts required proof *aliunde* and relied upon *Glasser*, it was well understood that the trial judge bore the burden of making a determination of the admissibility of co-conspirator statements and the determination would be made on the basis of independent evidence.

B. The Advisory Committee Believed That It Codified Pre-Existing Law And Adopted The Traditional Agency Approach, And The Lower Courts Have Correctly Interpreted The Legislative History

In its discussion of the co-conspirator rule, the Advisory Committee specifically stated that "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." 56 F.R.D. at 299. No clearer statement could have been made to establish that the Committee did not intend to expand admissibility of this form of evidence. Moreover, the Advisory Committee explained its

decision to place admissions in Fed. R. Evid. 801 rather than among the hearsay exceptions found in Fed. R. Evid 803 and 804 as resting upon a judgment that "[n]o guarantee of trustworthiness is required in the case of an admission." *Id.* at 297.

Every witness who testified or submitted a statement during the congressional hearings that touched upon the co-conspirator rule assumed that it reflected the common law approach.[10] The late circuit judge, Henry J. Friendly, traveled to hearings in Washington to state his reservations about codification. In the process, he indicated his belief that Rule 801(d)(2)(E) did not change the co-conspirator rule or "advance matters," but predicted that the short statement of the rule would require that courts fill in the obvious gaps, which is exactly what they have done.[11]

It is inconceivable that the Advisory Committee, this Court or the Congress would have abandoned the inde-

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[10] Senator McClellan, who was very influential in the final wording of the Federal Rules of Evidence, wrote to Judge Maris, indicating that he believed that the independent foundation was retained in Rule 801 (d)(2)(E). Letter from Senator McClellan to Judge Maris, August 12, 1971, in Supplement to Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 2d Sess., at 47, 57. Richard Keatinge and John Blanchard, who had experience with the California Evidence Code, submitted a lengthy analysis of the proposed Federal Rules, specifically concluding that the independent evidence requirement was codified, and citing *Glasser* and *Carbo*. Hearings on H.R. 5463 (Federal Rules of Evidence) Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., at 162. Herbert Semmel, representing a group of Washington, D.C. lawyers, submitted a lengthy analysis, specifically concluding that the rules would not affect the admissibility of co-conspirator statements. Senate Judiciary Comm. Hearings, at 318.

[11] House Subcomm. Hearings, *supra* note 10, at 249.

pendent evidence rule without ever mentioning such an important change and without ever correcting the understanding of the participants who believed that it was retained. Moreover, participants in the drafting process were undoubtedly aware of the fundamental principle of agency law, applicable in civil as well as criminal cases for many years, that is concisely stated in the ALI Restatement of the Law of Agency (Second) § 285 (1958):

> Evidence of a statement by an agent concerning the existence or extent of his authority is not admissible against the principal to prove its existence or extent, unless it appears by *other evidence* that the making of such statements was within the authority of the agent . . . . (Emphasis added)[12]

The Advisory Committee explicitly and clearly relied on agency theory in drafting the co-conspirator rule. One fundamental agency principle has been the independent evidence requirement. Nothing in the legislative history hints that a major departure from this principle was intended.

The circuits adhering to the independent evidence rule have written many opinions involving co-conspirator statements. They have expressed no concern that the rule limiting the trial judge to considering independent evidence in finding that a defendant was a member of a conspiracy along with a declarant has proved burdensome or has demonstrated the slightest unfairness to the government. They have read the language of the rule as assuming, according to the traditional approach and basic agency law, that a finding of conspiracy would precede the

[12] The Restatement also states in section 286 that apparent authority is simply not enough to warrant admitting an agent's statement.

determination whether a statement was made during and in furtherance of it. Every state court that has adopted a version of Rule 801(d)(2)(E) has required independent evidence when asked to state the standard of admissibility.[13]

C. The Rule Against Bootstrapping Is A Necessary Protection For The Defendant

On one point, petitioner and respondent are in agreement: statements that are admissible as non-hearsay or under another hearsay exception may be considered by the judge who rules on the admissibility of co-conspirator statements. Countless cases so hold. This point underscores the fundamental importance of a rule that prohibits co-conspirator statements from lifting themselves into evidence without independent support. The only situation in which the independent evidence rule matters arises when the government's case is so weak that after all of the evidence admissible under other hearsay exceptions—i.e., state of mind statements, declarations against interest, business records, and personal admissions—is added to all of the admissible nonhearsay proof as to what alleged co-conspirators did (i.e., nonassertive acts), and

[13] For two years, the Litigation Section of the American Bar Association has examined the various state evidence codes adopted contemporaneously with or after the Federal Rules of Evidence. The study, American Evidence Law, will be published this summer. It concludes that although there has been a departure from the independent evidence standard in the two federal circuits, "[t]he states, however, appear uniformly to have adopted the independent evidence requirement. No reported state decision has rejected it." Chapter 56, at 43. The ABA Litigation Section has agreed to provide copies of this chapter to the Court and to respondent. To assure appropriate disclosure, petitioner notes that one of the authors of this Reply participated in the ABA study.

to this combination is added all of the admissible nonhearsay statements—warnings, threats, etc.—a trial judge still cannot conclude that it is more likely than not that a defendant was involved in a conspiracy.

Respondent refers to the "irrationality of the scheme proposed by petitioner." Brief for Respondent, at 19. This pejorative label is hardly warranted, however. Petitioner merely submits that the traditional approach requiring independent evidence—the approach noted in *Glasser* and adopted by the great majority of federal circuits and by every state that has adopted rules—represents a fair and reasoned judgment that no person should be prosecuted on the basis of out-of-court statements by another when the government cannot muster enough proof to satisfy even a preponderance of the evidence test without using the other's statements. Any other rule gives enormous power to individuals to implicate innocent third parties almost at will.[14]

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[14] The proof *aliunde* requirement recognizes the ease with which one person can allege that others are involved in his or her activities. The same principle underlies the agency rule found in the ALI, Restatement of the Law of Agency (Second) § 285 (1958), discussed above. It signifies the wisdom of a rule that does not permit one person to impose liability upon another as a result of extra-judicial assertions which are so suspect that a reasonable trial judge would not conclude from all of the evidence other than the assertions themselves that it is more likely than not that the relationship described in the assertions actually existed. It is not enough to say that a trial judge will only admit co-conspirator statements that the judge believes. The judge might be inclined to credit statements when the defendant is unable to explain them. This is the dilemma of the defendant who was never part of a conspiracy. The defendant cannot explain statements that falsely implicate him, because he will not know why a declarant saw an advantage or had a motive in making reference to him.

II. STATEMENTS ADMITTED UNDER THE CO-CONSPIRATOR RULE SHOULD PRESUMPTIVELY SATISFY THE CONFRONTATION CLAUSE PROVIDED THERE IS PROOF *ALIUNDE* OF CONSPIRACY, BUT UNIQUE CIRCUMSTANCES MAY WARRANT A CONFRONTATION ANALYSIS

A. The Advisory Committee Expressly Left Open Confrontation Clause Attacks Upon Hearsay, And Congress Recognized This When It Adopted The Federal Rules Of Evidence

The Advisory Committee introduced Article VIII of the Federal Rules of Evidence, dealing with hearsay, with a "Special Introductory Note." 56 F.R.D. at 288-92. One section, entitled "Confrontation and Due Process", stated the Committee's conclusion "that a hearsay rule can function usefully as an adjunct to the confrontation right in constitutional areas and independently in nonconstitutional areas." *Id.* at 292. It added that "[i]n recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rule 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility." *Id.* Although the Note does not specifically mention Rule 801 (d), it is clear on the face of this rule that the Committee adopted an identical approach in this rule. Like Rules 803 and 804, Rule 801 (d) states that certain statements are not classified as hearsay; the effect is to exempt them from the ban on hearsay evidence, but there is no affirmative provision for their admission into evidence.

The Advisory Committee's intention not to insulate evidence falling within a hearsay exemption from Confrontation Clause attack was made clear in the language of

the rules, in its Note, and in testimony before Congress. The Committee's Reporter, Professor Cleary, testified that "these rules do not purport to deal with confrontation problems," and added with respect to one hearsay exception, "all that this rule would do would be in that situation to remove the hearsay objection, but it would leave the confrontation problem still to be decided."[15] In light of this history, the argument in the Brief for Respondent, at 37-38, that somehow the process of rule formulation insulates the Federal Rules from the Sixth Amendment stands the legislative history on its head.

B. The Co-Conspirator Rule In Its Current Form Is Very Different From The Rule Originally Adopted, And Respondent Would Have The Court Broaden The Rule Once More

Respondent is correct in observing that some forms of co-conspirator statements were admitted early in the history of Anglo-American evidence, but respondent utterly fails to discuss the ways in which the hearsay exception has broadened over time. The co-conspirator rule has grown as the doctrine of conspiracy has broadened, and it has demonstrated its own capacity for enlargement independent of the substantive law. The point is well illustrated by one of the cases respondent cites as establishing that the co-conspirator rule is firmly established. In *Krulewitch* v. *United States*, 336 U.S. 440 (1949), this Court reversed a defendant's convictions and rejected an

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[15] House Subcomm. hearings, *supra* note 10, at 542. The legislative history also indicates that Congress amended the hearsay rules with this testimony in mind. For example, a sentence was dropped from Rule 804(b)(3) at the suggestion of Senator McClellan, Letter, *supra* note 10, at 60, who expressed the view that the sentence appeared to address a Confrontation Clause concern, and it was his understanding that such concerns were not addressed in the rules.

effort by the United States to expand the evidence rule admitting co-conspirator statements. Justice Black's opinion for the Court rejected the government's argument that a statement made in furtherance of an alleged, but uncharged, conspiracy aimed at preventing detection and punishment could be used against persons who had conspired with one another. Yet, since that decision, lower federal courts have held that statements made in furtherance of one conspiracy may be admitted as proof of a separate, independent conspiracy.[16]

Concurring in *Krulewitch*, Justice Jackson described the federal law of conspiracy as a "long evolution of that elastic, sprawling and pervasive offense." 336 U.S. at 445.[17] He noted then that "[a] recent tendency has appeared in this court to expand this elastic offense and to facilitate its proof." *Id.* at 451. His illustration was *Pinkerton* v. *United States*, 328 U.S. 640 (1946), which "sustained a conviction of a substantive crime where there was no substantive proof of participation in or knowledge of it, upon the novel and dubious theory that conspiracy is equivalent in law to abiding and abetting." 336 U.S. at 451.[18]

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[16] *E.g.*, *United States* v. *Moosey*, 735 F.2d 633 (1st Cir. 1984); *Zenith Radio Corp. Matsushita Elec. Indus. Co.*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, ____ U.S. ____, 106 S.Ct. 1348 (1986). *See also United States* v. *Gotti*, 644 F. Supp. 370 (E.D.N.Y. 1986) (sufficient for government to prove a defendant's participation in a larger conspiracy even if it cannot prove he was a member of the conspiracy alleged in the indictment).

[17] His opinion was joined by Justices Frankfurter and Murphy.

[18] This Court recognized in *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946), that the offense of conspiracy had "broadened to include more and more, in varying degrees of attachment to the confederation."

The United States has persuaded lower federal courts to read the co-conspirator exemption expansively. Decisions hold that the government need only prove a combination, not that it was for an unlawful purpose[19]; statements by one co-conspirator reporting what another supposedly said are admissible[20]; statements made before a defendant joined a conspiracy are admissible against that defendant[21]; and a declarant's statements may be admitted against a defendant even if the declarant lacked personal knowledge when he spoke.[22]

The current form of the conspiracy doctrine and the evidence rule provide a much broader basis for admissibility than could have been imagined when the Confrontation Clause was adopted. To hold that anything that is labeled a co-conspirator statement automatically escapes Confrontation Clause analysis is to ignore the myriad of circumstances surrounding co-conspirator statements. Respondent cannot claim that the current, expanded approach to admissibility is long-standing, for the expansion has been persistent, especially recently.

If the Court were to agree with respondent that a trial judge may rely upon co-conspirator statements in deciding that a defendant was a member of a conspiracy along with a declarant, petitioner submits that the effect of such a holding would be to alter dramatically the way in which co-conspirator statements have historically been handled

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[19] *See, e.g., Government of Virgin Islands* v. *Braithwaite*, 782 F.2d 399 (3d Cir. 1986).

[20] *See, e.g., United States* v. *Womochil*, 778 F.2d 1311 (8th Cir. 1985).

[21] *See, e.g., United States* v. *Liefer*, 778 F.2d 1236 (7th Cir. 1985).

[22] *See, e.g., United States* v. *Ammar*, 714 F.2d 238 (3d Cir.), *cert. denied*, 464 U.S. 936 (1983).

in federal courts. Respondent's argument would strip from the defendant the proof *aliunde* protection and provide no substitute—e.g., the jury's second look or proof beyond a reasonable doubt. In the event this new rule is adopted, a Confrontation Clause analysis of all conspirator statements should be required.

C. Respondent Has Exaggerated A Defendant's Opportunity To Impeach A Co-Conspirator And The Burden Of Permitting A Limited Confrontation Clause Analysis Of Co-Conspirator Statements

Respondent asserts that there is no need for a trial judge ever to make a reliability determination since Fed. R. Evid. 806 enables a defendant to impeach a co-conspirator whose statement is offered. The assertion is greatly exaggerated. For example, Fed. R. Evid. 608 (b) bars extrinsic evidence of specific acts of misconduct. The rule may only be used when a declarant is present in court to testify, not when a nontestifying co-conspirator's statement is offered. Other rules that theoretically permit impeachment have been held not to do so in particular cases. In *United States* v. *Ammar*, 714 F.2d 238 (3d Cir.), *cert. denied*, 464 U.S. 936 (1983), for example, one defendant (Stillman) whose conviction rested largely on the extrajudicial co-conspirator statements of another defendant (Ammar) could not impeach Ammar with prior convictions, because the government successfully persuaded the lower courts that its interest in consolidating the cases for trial and the nontestifying Ammar's interest in avoiding the prejudice of the convictions took precedence over Stillman's impeachment needs.

Furthermore, last term's decision in *United States* v. *Inadi*, ___ U.S. ___ 106 S.Ct. 1121 (1986), signifies that the government may avoid the impeachment that often occurs through a successful cross-examination by with-

holding the co-conspirator statements prior to trial and surprising the defendant to assure that opportunities for cross-examination and impeachment are minimized, if not absolutely prevented. Even if defendants are aware of the alleged co-conspirators whose statements will be offered, those co-conspirators might require use immunity before they will testify and answer a defendant's questions. Thus far, the United States has successfully argued that it has no obligation to confer use immunity on a co-conspirator declarant. *See, e.g., United States* v. *Georgia Waste Systems, Inc.*, 731 F.2d 1580 (11th Cir. 1984).[23]

Respondent claims that no case has found co-conspirator statements to violate the Clause. Although this is untrue,[24] petitioner does not claim there will be many such cases. He contends that in some cases justice will only be done if trial judges and appellate courts are

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[23] It is obvious that impeachment by showing a witness' bias, interest, inability to articulate facts clearly, memory problems, and sensory deficiencies is often dependent on an opportunity to produce the witness for evaluation by the trier of fact.

[24] In *United States* v. *Ordonez*, 737 F.2d 793, 802 (9th Cir. 1984), a trial judge found that evidence of various ledgers satisfied the evidence rule. The court of appeals reversed, finding that the government had not laid a proper foundation and declined to remand for further preliminary fact finding on the ground that the Confrontation Clause was violated when the statements were admitted even if the hearsay rule was satisfied. In *United States* v. *Mouzin*, 785 F.2d 682, 691 (9th Cir. 1986), the Court referred to *Ordonez* as a Confrontation Clause case, again declined to remand for additional preliminary fact finding, and held that admission of a computer printout seized during a search violated the Confrontation Clause even if it satisfied the evidence rule. Many other circuits have declined to review Confrontation Clause claims. Thus, they have had no opportunity to determine whether statements satisfying the evidence rule would fail a confrontation test.

entitled to enforce the Confrontation Clause. Under the approach suggested by petitioner, the burden of demonstrating unique circumstances warranting a special Sixth Amendment analysis must be borne by a defendant. The cases decided in circuits that have recognized the possible application of the Confrontation Clause to co-conspirator statements demonstrate that, except in the few cases in which the courts have found the confrontation issue to be extremely strong in light of the defendant's specific confrontation claim, the lower courts have disposed of the confrontation claims quickly and with no apparent difficulty.

CONCLUSION

For the reasons stated in petitioner's opening and this reply brief, petitioner asks that this Court reverse the judgment of the court of appeals and either remand for reconsideration of the admissibility of the co-conspirator statements or hold that there simply was no evidence of

conspiracy other than co-conspirator statements which should not have been admitted against him.[25]

Respectfully submitted,

JAMES R. WILLIS
(Counsel of Record)
Suite 610, Bond Court Building
1300 East Ninth Street
Cleveland, OH 44114
(216) 523-1100

JAMES M. SHELLOW
SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, WI 53202
(414) 271-8535

STEPHEN ALLAN SALTZBURG
University of Virginia
School of Law
Charlottesville, VA 22901
(804) 924-3520
Counsel for Petitioner

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[25] The record is devoid of evidence to hint, let alone prove, that petitioner had any relationship with Lonardo aside from Lonardo's placement of cocaine in petitioner's car on a single occasion. Respondent has conceded that no conspiracy can be based upon a single purchase-sale transaction. Brief in Opposition to Petition for Certiorari, at 5 n.4. From his conversations with Greathouse, it appears possible that Lonardo might have had ongoing relationships with others, but there is nothing to imply that he had any conspiratorial relationship with petitioner, and Lonardo's state of mind is irrelevant to a charge against petitioner. Respondent confuses evidence of the substantive offense that was charged with evidence of conspiracy. Nothing that occurred on the one occasion that Lonardo had any contact with petitioner supports a conspiracy allegation. Without the taped conversations between Lonardo and Greathouse, which the trial judge permitted the jury to use against petitioner, there would have been no evidence at all to support a conspiracy count against petitioner and no basis for admitting the conversations against petitioner.

No. 85-6725

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM J. BOURJAILY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING PETITIONER

JUDY CLARKE*
Executive Director
Federal Defenders of San Diego, Inc.
101 West Broadway, Suite 440
San Diego, CA 92101-8297
(619) 234-8467
*Counsel of Record

MARIO G. CONTE
Chief Trial Attorney
Federal Defenders of San Diego, Inc.

FREDERICK M. SCHNIDER
Law Graduate
Federal Defenders of San Diego, Inc.

56

QUESTIONS PRESENTED

1. Whether, in order to admit an alleged co-conspirator's declarations against a defendant under Federal Rule of Evidence 801(d)(2)(E), the court must determine by independent evidence: a) that a conspiracy existed, and b) that the declarant and the defendant were members of this conspiracy?

2. Assuming that the court must make these determinations, upon what quantum of independent proof must they be based?

3. Whether, as a requirement for the admission of a co-conspirator's statement against a defendant, the court must assess the circumstances of the case to determine whether the statement carries with it sufficient indicia of reliability?

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae files this brief with the consent of Petitioner William J. Bourjaily through counsel James R. Willis and Respondent United States of America, Charles Fried, Solicitor General. The

letters of consent from both parties are on file with the Clerk of the United States Supreme Court.

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia nonprofit corporation with a membership of more than 4,000 lawyers, including representatives of every state. The membership consists of trial and appellate advocates, law professors and judges who are concerned with protecting the constitutional and statutory rights of the accused. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of this organization's objective, and of the criminal justice system, is the fundamental constitutional protection of an individual's Sixth Amendment rights. NACDL is very concerned about any decision that would undermine or dilute this constitutional guarantee.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to the fundamental fairness of the trial of conspiracy cases and the preservation of the Sixth Amendment Confrontation Clause

that NACDL should offer its assistance to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petitioner in this case was convicted of two offenses, possession with intent to distribute cocaine and conspiracy to distribute cocaine, in violation of Title 21, United States Code, §§ 841(a)(1) and 846. These convictions were based, in large part, on evidence consisting of taped conversations between a government informant, who supplied the cocaine, and petitioner's co-defendant. United States v. Bourjaily, 781 F.2d 539, 544-45 (6th Cir. 1986). None of these conversations made any reference to the petitioner by name or description. No direct evidence was presented that petitioner ever

communicated with either party to these conversations. Id. at 541.

Nevertheless, the taped conversations were admitted over objection as co-conspirator declarations under Fed. R. Evid. 801(d)(2)(E). The trial court utilized the "preponderance of the evidence" standard in making this determination. However, the court improperly relied on the content of the statements themselves as evidence that the petitioner and the declarant were members of the same conspiracy. Id. at 542. The court also failed to determine whether the statements bore sufficient indicia of reliability to satisfy the Sixth Amendment Confrontation Clause.

Proper administration of Fed. R. Evid. 801(d)(2)(E), especially in criminal trials, demands that the trial court find by independent evidence that

the defendant and the out-of-court declarant were members of the same conspiracy, before admitting any co-conspirator declarations at trial. This finding should be supported by at least a "preponderance of the evidence." The court is also constitutionally obligated to determine whether the statements are reliable enough to satisfy the Confrontation Clause of the Sixth Amendment. These precautions are dictated by practical, as well as constitutional, considerations.

ARGUMENT

1. THE DETERMINATION THAT THE DEFENDANT AND DECLARANT WERE MEMBERS OF THE SAME CONSPIRACY MUST BE BASED ON EVIDENCE INDEPENDENT OF THE STATEMENTS THEMSELVES.

The text and underlying rationale of Rule 801(d)(2)(E) establish that admissibility of statements under the

rule depends on the existence of a distinct factual predicate.[1] Consequently, before a statement is admissible under the rule, it must be shown that a conspiracy existed, that both the defendant and the declarant were members of the same conspiracy, and that the statement was made during the course of and in furtherance of the conspiracy. If these conditions precedent are not satisfied, the rule does not come into play, and the statements fall into the general category of hearsay, when offered for the truth of the matter asserted. Fed. R. Evid. 801(c).

The fundamental rationale for

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[1]/ Fed. R. Evid. 801(d)(2)(E) provides that: (d) A statement is not hearsay if--(2) the statement is offered against a party and is (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

treating co-conspirator declarations as nonhearsay is really a fiction. See Advisory Committee Notes, Fed. R. Evid. 801(d)(2)(E); 28 U.S.C. app. § 718. Extending the logic of other rules which provide for the admissibility of "vicarious admissions," the co-conspirator exception is likewise grounded in principles of agency. According to these principles, a member of a joint venture authorizes or adopts any statements made by other members of the group in furtherance of the joint venture's objectives. Id.

The agency rationale disappears altogether if it cannot be shown that the defendant and the declarant were members of the same joint venture or conspiracy. Several cogent reasons require exclusion of the content of the statements themselves from this factual inquiry.

The most compelling reason for requiring this determination to be made on the basis of independent evidence is that to do otherwise would constitute unjustified "bootstrapping." Glasser v. United States, 315 U.S. 60, 75 (1942). A plain reading of the rule itself demonstrates that a purported co-conspirator statement is incompetent hearsay unless it is shown that the defendant and declarant were, in reality, co-conspirators. Even if details contained in the out-of-court assertions are subsequently "verified," those details still constitute pure hearsay, and should play no role in vouching for the nonhearsay status of the statement. See United States v. Coe, 718 F.2d 830, 836 (7th Cir. 1983). Besides being an exercise in tautology, such a practice gives undue weight to the out-of-court

assertions, which lack any intrinsic guarantees of trustworthiness.

In particular, the court is left with no way of measuring the accuracy, sincerity or intended meaning of those assertions. Moreover, when the hearsay assertions are allowed to help establish the factual predicate for their own admission, the quantum of proof required to show admissibility is blurred. Where the statements directly implicate the defendant in the conspiracy, these statements will unavoidably be heavily weighted in making the preliminary determination. Thus, the likelihood that a statement will be mistakenly admitted due to hearsay infirmities in its foundation rises in proportion to the amount of prejudice it would cause the defendant at trial. This runs contrary to the principle that the more "crucial"

or "devastating" the out-of-court statement, the closer scrutiny it merits. Dutton v. Evans, 400 U.S. 74, 87 (1970).

Other reasons exist for mandating independent proof that the defendant and declarant were members of the same conspiracy. The circuit courts of appeals are virtually unanimous in their approval of this requirement.[2] Only the

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[2] See, e.g., United States v. Nardi, 633 F.2d 972, 974 (1st Cir. 1980); United States v. Garcia-Duarte, 718 F.2d 42, 45 (2d Cir. 1983); United States v. Ammar, 714 F.2d 238, 247 (3d Cir.), cert. denied, 464 U.S. 936 (1983); United States v. Jackson, 757 F.2d 1486, 1490 (4th Cir.), cert. denied, 106 S. Ct. 407 (1985); United States v. James, 590 F.2d 575, 582 (5th Cir.), cert. denied, 442 U.S. 917 (1979); United States v. Coe, 718 F.2d 830, 835 (7th Cir. 1983); United States v. Massa, 740 F.2d 629, 637-38 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985); United States v. Perez, 658 F.2d 654, 659 (9th Cir. 1981); United States v. Metropolitan Enterprises, 728 F.2d 444, 448 (10th Cir. 1984); United States v. Zielie, 734

Sixth Circuit accepts the practice of crediting the statement's content in making the preliminary finding.[3] See, e.g., United States v. Piccolo, 723 F.2d 1234, 1240 & n.1 (6th Cir. 1983) (en banc), cert. denied, 466 U.S. 970 (1984); United States v. Enright, 579 F.2d 980, 985 n.4 (6th Cir. 1978). In fact,

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F.2d 1447, 1457 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); United States v. Weisz, 718 F.2d 413, 433 (D.C. Cir. 1983), cert. denied, 465 U.S. 1027 (1984).

[3]/ The First Circuit has given limited credit to this practice where there is significant independent evidence of the existence of the conspiracy and where the statement sought to be admitted simply corroborates inferences which can be drawn from the independent evidence. United States v. Martorano, 557 F.2d 1, 12 (1st Cir. 1977), cert. denied, 435 U.S. 922 (1978). The general practice of the First Circuit is to require proof of the existence of the conspiracy by a preponderance of independent nonhearsay evidence. See United States v. Nardi, 633 F.2d 972 (1st Cir. 1980).

several circuits would exclude the statement from the entire fact-finding process required by Rule 801(d)(2)(E).[4] Whether or not a statement furthers the objectives of a given conspiracy necessarily depends on the content of the statement itself. The question of whether the defendant and the declarant were engaged in a common conspiracy should not be answered by reference to out-of-court assertions which cannot be meaningfully challenged or explored by the defendant.

Establishing a clear "independent

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[4]/ See, e.g., United States v. James, 590 F.2d 575, 582 (5th Cir.), cert. denied, 442 U.S. 917 (1979); United States v. Metropolitan Enterprises, 728 F.2d 444, 448 (10th Cir. 1984); United States v. Zielie, 734 F.2d 1447, 1457 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); United States v. Gantt, 617 F.2d 831, 844 (D.C. Cir. 1980).

evidence" rule would promote uniformity and consistency among the circuits on this question, as well as resolve uncertainty within individual circuits like the First and Sixth. Conversely, to allow the statements in to prove their own admissibility would reverse long-standing law in at least nine circuits. In addition, this Court has previously recognized that the preliminary findings required by Rule 801(d)(2)(E) should be based on "substantial independent evidence." United States v. Nixon, 418 U.S. 683, 701 n.14 (1974).

Such a rule also imposes no unreasonable burden on the prosecution. The government is still free to prove that conversations took place between certain individuals under certain circumstances without using the substance of the conversations. The government is

also free to use other forms of relevant evidence which may be inadmissible at trial, such as affidavits or other reliable hearsay. See Fed. R. Evid. 104(a). Finally, several circuits allow the government to make a preliminary showing of admissibility, then conditionally introduce the statements subject to a full showing that they meet the requirements of Rule 801(d)(2)(E).[5] This procedure avoids having the government present duplicate or awkwardly ordered proof at trial. Where a conspiracy has been charged, the

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[5] See, e.g., United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970); United States v. Ammar, 714 F.2d 238, 247 (3d Cir.), cert. denied, 464 U.S. 936 (1983); United States v. James, 590 F.2d 575, 582 (5th Cir.), cert. denied, 442 U.S. 917 (1979); United States v. Metropolitan Enterprises, 728 F.2d 444, 448 (10th Cir. 1984).

testimony may be conditionally admitted with an instruction that the jury is not to consider it until a conspiracy is found beyond a reasonable doubt. Thus, if a no-conspiracy finding is later made, the jury must be instructed to ignore the specific items of testimony conditionally admitted. E.g., United States v. Gere, 662 F.2d 1291, 1294 (9th Cir. 1981).

In short, the government has ample opportunity to present independent evidence that the defendant and declarant were co-conspirators without resorting to the self-referential process of allowing untried hearsay to prove the conditions of its own admissibility.

2. THE DETERMINATION THAT THE DEFENDANT AND DECLARANT WERE MEMBERS OF THE SAME CONSPIRACY MUST BE MADE BY A PREPONDERANCE OF THE EVIDENCE.

Like the requirement of "independent evidence," the requirement that the

factual predicate for admitting statements under the co-conspirator exception be established by a "preponderance of the evidence" is strictly followed in most of the circuits.[6] Similar considerations and authority justify the application of the preponderance standard to the Rule 801(d)(2)(E) inquiry.

First, compliance with the rule

6/ United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977); United States v. Garcia-Duarte, 718 F.2d 42, 45 (2d Cir. 1983); United States v. Ammar, 714 F.2d 238, 250 (3d Cir.), cert. denied, 464 U.S. 936 (1983); United States v. James, 590 F.2d 575, 582 (5th Cir.), cert. denied, 442 U.S. 917 (1979); United States v. Enright, 579 F.2d 980, 986 (6th Cir. 1978); United States v. Coe, 718 F.2d 830, 835 (7th Cir. 1983); United States v. Massa, 740 F.2d 629, 637-38 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985); United States v. Metropolitan Enterprises, 728 F.2d 444, 448 (10th Cir. 1984).

itself is not assured by a lesser standard of proof. If statements could be admitted upon a prima facie showing, then statements which are "more likely than not" beyond the scope of the rule would still be presented to the jury. This is especially true given the wide scope of evidence the court may consider in making its preliminary finding. Fed. R. Evid. 104(a); see United States v. Enright, 579 F.2d 980, 985 n.4 (6th Cir. 1978); United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977). The prospect of an over-inclusive co-conspirator rule threatens the balance between adversary interests embodied in the rule.

Courts have also suggested that the language of Rule 104(a), which requires the trial judge to "determine" preliminary questions of admissibility,

compels a "preponderance of the evidence" standard. See, e.g., United States v. Andrews, 585 F.2d 961, 966 (10th Cir. 1978); Petrozziello, 548 F.2d at 23. Moreover, the trial courts are by now familiar with the application of this standard in the context of determining the voluntariness of a confession. Lego v. Twomey, 404 U.S. 477 (1972). Recently this Court set the "preponderance of the evidence" standard as the quantum of proof necessary to show a waiver of Miranda rights as well. Colorado v. Connelly, No. 85-660 (U.S. 10 December 1986).

In light of the near unanimous acceptance of the preponderance standard by the circuit courts, and the apparently workable nature of that standard, this Court should take the opportunity to affirm the recognized standard and

establish a "preponderance of the evidence" standard for all 801(d)(2)(E) inquiries.[7]

As argued above, establishing a clear burden of proof under Rule 801(d)(2)(E) would create desirable uniformity among the circuits on this recurring issue. That most of the circuits have already adopted a preponderance standard suggests that it is the practical and workable method of administering Rule 801(d)(2)(E), both at the trial and appellate levels. The availability of harmless error analysis remains to guard against unjustified reversals of criminal convictions. More

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7/ Respondent appears to agree that "preponderance of the evidence" is the standard. See Brief for United States in Opposition to Petition for Writ of Certiorari, argument 1.a.

importantly, the preponderance standard is the only burden of proof consistent with the trial court's function of screening out unreliable or unfairly prejudicial evidence. Under a lesser standard, this function cannot be meaningfully exercised, and unjust convictions will inevitably result.

There was simply no evidence, independent of the statements, of a conspiracy in petitioner's case. As respondent concedes in its Brief in Opposition to the Petition for a Writ of Certiorari, neither the buyer nor the seller of narcotics can be guilty of a conspiracy and because Greathouse was a government informant there could not be a conspiracy between Greathouse and Lonardo, petitioner's co-defendant. Lonardo's delivery of the cocaine to petitioner's car and petitioner's

possession of $21,000 likewise does not establish a conspiracy but rather that petitioner was either the purchaser or an "aider and abettor." See 18 U.S.C. § 2. Aiding and abetting and conspiracy are separate crimes. Nye & Nissen v. United States, 336 U.S. 613 (1949); Sealfon v. United States, 332 U.S. 575 (1948); see, e.g., United States v. Van Brandy, 726 F.2d 548 (9th Cir.), cert. denied, 469 U.S. 839 (1984) (defendant convicted of aiding and abetting bank robbery but acquitted of conspiracy to rob the bank). Petitioner was in fact convicted of possession with intent to distribute cocaine.

3. COURTS ARE CONSTITUTIONALLY OBLIGATED TO DETERMINE WHETHER CO-CONSPIRATOR STATEMENTS ADMISSIBLE UNDER FED. R. EVID. 801(d)(2)(E) ARE SUFFICIENTLY RELIABLE TO COMPORT WITH THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

In United States v. Inadi, 106 S.

Ct. 1121 (1986), this Court left open the question of whether the admission of co-conspirator statements under Rule 801(d)(2)(E) may nevertheless violate the Confrontation Clause, absent a showing that the statements are reliable. Id. at 1124 n.3. This really presents two questions. First, are co-conspirator statements inherently reliable such that their admission can never violate the Confrontation Clause? Second, if co-conspirator statements are not inherently reliable, is there any justification other than reliability which supports dispensing with the protections afforded by the Confrontation Clause in the context of co-conspirator statements?

The contention that co-conspirator statements are inherently reliable is not widely maintained, and ignores con-ventional wisdom about the conduct and

perpetrators of criminal conspiracies. It has been recognized that:

> The unreliability of co-conspirator declarations as trial evidence is not merely a product of the duplicity with which criminals often conduct their business. It also stems from the ambiguities that so often appear in all casual conversations, not just those of outlaws. [Citations omitted.] And the difficulties one has in making sense of slang and dialect can be compounded where conspirators use private codes . . . .

Inadi, 106 S. Ct. 1121, 1132 (Marshall, J., dissenting); see Bruton v. United States, 391 U.S. 123, 141-42 (1968) (co-defendant statements "intrinsically much less reliable" than other forms of hearsay and have been traditionally viewed with special suspicion (White, J., dissenting)).

The duplicity and ambiguity which characterize criminal enterprises bears further comment. Despite the existence

of identifiable goals, many conspiracies are marked by intense competition, mutual distrust and fear of being discovered. Each of these factors can motivate the individual conspirator to mischaracterize his actions and beliefs. Moreover, since the conduct is already criminal, many of the disincentives associated with being dishonest in the context of a legitimate business venture do not exist in the context of a conspiracy. Thus, there is strong reason to doubt the reliability of communications between co-conspirators, more so than communications between ordinary business partners.

This case is a perfect example of the inherent unreliability of alleged co-conspirator statements. Here, the statements of Lonardo were both crucial to the government and devastating to the defense in that they were the only

evidence suggesting involvement by a multiple layer of buyers. In addition, they were made by a person (Lonardo) with a motive to lie and an interest in stringing Greathouse along in order to make an ultimate purchase. The statements did not refer to anyone by name or offer any description of the purported purchasers sufficient to allow any independent corroboration of their truth.

Declarations Against Interest

Some courts have attempted to skirt the issue by treating all co-conspirator statements as "declarations against interest," which are "presumptively reliable." See Fed. R. Evid. 804(b)(3); United States v. Paone, 782 F.2d 386, 391 (2d Cir.), cert. denied, 107 S. Ct. 269 (1986); United States v. Dunn, 758 F.2d 30, 39 (1st Cir. 1985); cf. United States

v. Perez, 658 F.2d 654, 662 (9th Cir. 1981) (court considers whether statement is against interest as part of reliability inquiry). The argument that co-conspirator declarations are necessarily reliable as "declarations against interest" results from an overbroad reading of Fed. R. Evid. 804(b)(3). First, if Rule 801(d)(2)(E) were intended as a discrete subset of declarations against interest, there would be no reason to have the rule. In Lee v. Illinois, 106 S. Ct. 2056, 2064 n.5 (1986), this Court rejected the state's categorization of the hearsay confession of the co-defendant as a simple declaration against interest finding that "[t]hat concept defines too large a class for meaningful Confrontation Clause analysis." Second, probably just a small fraction of co-conspirator statements

would actually fall within Rule 804(b)(3). Statements made in furtherance of a conspiracy necessarily serve the declarant's interest in achieving the conspiracy's objectives. However incriminating the statements may be, the presence of an alternative motivation for making them distinguishes them from pure declarations against interest, which are presumptively reliable.

Firmly Rooted Hearsay Exception

Other courts have held that co-conspirator statements "fall within a firmly rooted hearsay exception," from which reliability can be inferred. See Ohio v. Roberts, 448 U.S. 56, 66 (1979) (general statement of the rule); see also United States v. McLernon, 746 F.2d 1098, 1106 (6th Cir. 1984); United States v. Xheka, 704 F.2d 974, 987 n.7 (7th

Cir.), cert. denied, 464 U.S. 993 (1983); United States v. Peacock, 654 F.2d 339, 349 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983). However, it must be recognized that the Confrontation Clause and the hearsay rule are not co-extensive and that admitting an out-of-court statement into evidence may still violate the Confrontation Clause even though the evidence falls within a recognized hearsay exception. Dutton v. Evans, 400 U.S. 74, 82, 86 (1970); California v. Green, 399 U.S. 149, 155-56 (1970). In Lee v. Illinois, 106 S. Ct. 2056 (1986), the Court held that a co-defendant's hearsay confession inculpating the defendant was inadmissible under the Confrontation Clause because it was unreliable. Co-conspirator statements are shrouded by similar concerns of unreliability in that often such

statements involve the use of codes, boasting, threats or other language designed to encourage involvement of potential co-conspirators. "Honesty among thieves" cannot be presumed and should certainly not form a presumptive basis of reliability. It is not a complex matter for the government to rebut the presumption of unreliability, discussed infra, by meeting the Dutton factors.[8] See, e.g., Lee v. Illinois.

8/ See United States v. Alfonso, 738 F.2d 369, 372 (10th Cir. 1984) (holding that co-conspirator statement contained sufficient indicia of reliability and was not crucial to the prosecution's case); United States v. Tille, 729 F.2d 615, 621 (9th Cir.) (statement held to be reliable because four reliability factors from Dutton were satisfied), cert. denied, 105 S. Ct. 156 (1984); United States v. Arbelaez, 719 F.2d 1453, 1460 (9th Cir. 1983) (statement held to be reliable because part of an ongoing transaction about which the declarant had personal knowledge),

Any attempt to circumvent the Confrontation Clause by simply designating Rule 801(d)(2)(E) as a "firmly rooted hearsay exception" ignores the plain language of the rule, the sense of Roberts, and the fundamental distinction

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cert. denied, 104 S. Ct. 3543 (1984); United States v. Layton, 720 F.2d 548, 561 (9th Cir. 1983) (statements sufficiently reliable under a Dutton analysis), cert. denied, 104 S. Ct. 1423 (1984); United States v. Ammar, 714 F.2d 238, 256-57 (3d Cir.) (sufficient indicia of reliability), cert. denied, 464 U.S. 936 (1983); United States v. Fleishman, 684 F.2d 1329, 1340 (9th Cir.) (same), cert. denied, 459 U.S. 1044 (1982); United States v. Perez, 658 F.2d 654, 661-62 (9th Cir. 1981) (testimony reliable because of surrounding circumstances); cf. United States v. Wright, 589 F.2d 31, 38 (2d Cir. 1978) (pre-Roberts case in which testimony was found to be reliable and neither crucial nor devastating), cert. denied, 440 U.S. 917 (1979); United States v. Rogers, 549 F.2d 490, 500-02 (8th Cir. 1976) (same), cert. denied, 431 U.S. 918 (1977).

between the reliability of an out-of-court statement and the right of confrontation. As this Court stated in Dutton v. Evans, 400 U.S. 74 (1970):

> [T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement."

Dutton, 400 U.S. at 89 (quoting California v. Green, 399 U.S. 149, 161 (1970)). The circuits which treat co-conspirator statements as within a "firmly rooted hearsay exception" have made no effort to justify this treatment as a function of the statement's reliability. See Note, Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Co-conspirator Hearsay,

53 Fordham L. Rev. 1291, 1310 (1985).

Certain hearsay exceptions have been recognized as "firmly rooted," e.g., "dying declarations," business records, public records, and prior trial testimony subject to cross-examination. Roberts, 448 U.S. at 66 n.8. In general, the hearsay exceptions would qualify for this presumption of reliability because reliability is a factor in each of the exceptions.[9] Party admissions are admitted not because of inherent reliability but because the party is directly responsible for the statement

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9/ The "catchall" exceptions, Fed. R. Evid. 803(24) and 804(b)(5), authorize the use of hearsay that carries certain indicia of trustworthiness. All of the hearsay exceptions contained in Rules 803 and 804 have reliability or trustworthiness underpinnings. See McCormick, Handbook on the Law of Evidence § 269, at 628; 5 Wigmore on Evidence §§ 1420, 1422.

and may explain it away if it is untrustworthy or untrue. Co-conspirator statements, grounded in the concept of agency admissions, are not necessarily trustworthy nor can a party simply explain away what may have been meant by another person.[10] While in many instances, co-conspirator statements which meet the criteria of admission by a preponderance of independent evidence of a conspiracy will be sufficiently reliable to satisfy the Confrontation Clause, such statements should not be considered sufficiently reliable in and

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10/ Statements of co-conspirators made in the presence of the defendant against whom they are sought to be admitted may gain some inherent reliability because of the defendant's ability to refute what is said within his or her hearing and ability to respond. See Fed. R. Evid. 801(d)(2)(B).

of themselves to justify dispensing with the defendant's right to confrontation. See United States v. Wright, 588 F.2d 31, 37-38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); United States v. Ammar, 714 F.2d 238, 255 (3d Cir.), cert. denied, 464 U.S. 936 (1983); United States v. Massa, 740 F.2d 629, 639 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985); United States v. Ordonez, 737 F.2d 793, 802 (9th Cir. 1984). These courts acknowledge that the rationale for admitting co-conspirator statements has nothing to do with their inherent reliability. Rather, concerns of fairness and necessity justify the admission of statements under Rule 801(d)(2)(E). See, e.g., Ammar; Massa.

Determining Reliability

Concerns of adversarial fairness and necessity underlie this Court's recent

decision in Inadi, which dispensed with the unavailability requirement under Rule 801(d)(2)(E). United States v. Inadi, 106 S. Ct. at 1126-29. The Court reasoned that the practical burden imposed on the prosecution to locate and produce an absent declarant was not justified by the "marginal protection" to the defendant achieved by an unavailability rule. This Court indicated that the admissibility of statements under Rule 801(d)(2)(E) is not a function of their inherent reliability, nor is it really an application of agency principles. Rather, Rule 801(d)(2)(E) comprehends the tension between the government's need to gather evidence of criminal activity, and the inherent secrecy and impenetrability of criminal conspiracies.

Thus, the primary function of Rule

801(d)(2)(E) is to "obtain evidence of the conspiracy's context which cannot be replicated," or "to recapture the evidentiary significance of statements made when the conspiracy was operating in full force." Id. at 1126, 1127.

These considerations may justify allowing co-conspirator statements into evidence without a showing that the declarant is unavailable. These same considerations, however, cannot support a rule which does not distinguish between reliable and unreliable evidence. The government's compelling interest in "recapturing the evidentiary significance" of statements made during a conspiracy is not served by a rule which allows any statement into evidence, without regard to its accuracy, security or intended meaning. The potential for prejudice to the defendant under such a

system is almost unchecked.

"Reliability is the key to the hearsay rule and the confrontation clause." Haggins v. Warden, 715 F.2d 1050, 1056 n.6 (6th Cir. 1983), cert. denied, 464 U.S. 1071 (1984).[11] In the case of out-of-court statements which are not inherently reliable, the trial court is obligated to decide whether they are reliable enough to admit into evidence, without giving the defendant an opportunity to test the statements by cross-examination. This is not an

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11/ The court quoted Judge Talbot Smith: "Any rule, I submit, requiring thirty-two exceptions to explain its operation is not a rule at all but a nonexistent Eudoxian universe. . . . What we really determine in our everyday lives is not whether a report is hearsay, but whether it is reliable." Smith, The Hearsay Rule and The Docket Crisis: The Futile Search for Paradise, 54 A.B.A. J. 231, 235-36 (1968).

arduous procedure. Under the four-part test established in Dutton v. Evans no denial of confrontation occurs when:

1) the statement does not contain express assertions about past facts;
2) the declarant's personal knowledge of the recited facts is established by independent evidence;
3) the statement is not likely to have been based on faulty perceptions; and
4) the circumstances surrounding the statement tend to show that the declarant had no motive to falsify the content of the statement.

Dutton, 400 U.S. at 88-89. These factors incorporate the traditionally recognized elements for reliability in hearsay or

any testimony, i.e., the quality of the declarant's memory, clarity of expression, perception and sincerity. See Tribe, Triangulating Hearsay, 87 Harv. L. Rev. 957, 958-61 (1974).

The determination of reliability does not require the government to shoulder an onerous burden, but rather, can be framed in terms of a showing of "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66; Fed. R. Evid. 803(24), 804(b)(5). If the declarant is available to the parties to subpoena or interview, the statements may take on a higher initial form of reliability in that the declarant can be examined to determine satisfaction of the Dutton factors. Should the factors be met, the burden would then shift to the defendant to demonstrate why reliability is still lacking.

However, if the declarant is unavailable, the government should then shoulder the burden of demonstrating why the statements have "particularized guarantees of trustworthiness" sufficient to allow their admission without confrontation by the defense. The quantum of trustworthiness that will suffice can be measured by the Dutton factors as well as whether or not the statements were some other form of cross-examined testimony of the unproduced witness, thus providing the defendant with some minimal confrontation protections.[12] As noted earlier,

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[12]/ The government should be required to make a showing that the statements satisfy all four of the Dutton factors because co-conspirator declarations contain no basis in trustworthiness, and must overcome the weaknesses of ambiguity, insincerity, faulty perception, and erroneous memory either of the declarant or the testifying witness.

Lonardo's statements as admitted against petitioner were completely unreliable. There was no reference to petitioner by name nor even any identifying characteristics and certainly the circumstances were such that Lonardo had many reasons to exaggerate or lie to Greathouse in order to consummate an eventual sale. See supra pp. 25-26.

In the absence of a showing of availability of the declarant to the defense or other forms of evidence showing that the defendant was present when the statements were made, the government must bear the burden of establishing the reliability of co-conspirator statements. Unlike civil cases where there is substantial pre-trial discovery available to both parties, criminal defendants are limited in their pre-trial access to information

by strict federal rules.[13] See Fed. R. Crim. P. 12(i) and 16; 18 U.S.C. § 3500. Consequently, most defendants are unaware of co-conspirator statements and are surprised by their introduction at trial.

The tension between the government's burden and traditional notions of confrontation must not abrogate the latter completely. Under this alternative, confrontation may be diluted but not wholly extinguished.

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[13]/ There is no definitive ruling regarding whether a defendant is entitled to the pre-trial production of statements of co-conspirators. Compare United States v. Percevault, 490 F.2d 126, 131 (2d Cir. 1974) (production of co-conspirator statements made by prospective government witnesses not required), and United States v. McMillen, 489 F.2d 229 (7th Cir. 1972) (same), with United States v. Jackson, 757 F.2d 1486 (4th Cir. 1985) (defendant entitled to disclosure if co-conspirator not a prospective government witness and disclosure does not unnecessarily reveal sensitive information).

The Dutton test cannot substitute for the right to actually confront and cross-examine adverse witneses. It can, however, provide a measure of protection for the defendant who is confronted at trial, not by his accuser, but by a "very large box of tapes." Inadi, 106 S. Ct. at 1135 (Marshall, J., dissenting). In this situation, the Confrontation Clause minimally requires that co-conspirator declarations be examined for "indicia of reliability." As this Court recently stated in Lee v. Illinois, 106 S. Ct. 2056, 2062 (1986):

> [T]he right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and the accuser

> engage in an open and even contest in a public trial. The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown--and hence unchallengeable--individuals.

CONCLUSION

The Judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

JUDY CLARKE*
Executive Director
Federal Defenders of San Diego, Inc.
101 West Broadway, Suite 440
San Diego, CA 92101-8297
(619) 234-8467
*Counsel of Record

MARIO G. CONTE
Chief Trial Attorney
Federal Defenders of San Diego, Inc.

FREDERICK M. SCHNIDER
Law Graduate
Federal Defenders of San Diego, Inc.

On Behalf of the National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner

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